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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1929

## No. 79

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA, PETITIONER,

*vs.*

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS (SUED AS NEIL A. WEATHERS), AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 4, 1929

CERTIORARI GRANTED JUNE 3, 1929

(34,188)

# (34,188)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1929

[fols. a & 1]

**IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

HARRY C. MOORE, as Treasurer of Grant County, Indiana, Plaintiff,

against

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (Sued as Neil A. Weathers), as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, Defendants

NOTICE OF MOTION FOR ORDER DISMISSING COMPLAINT

SIR: Please take notice that on the summons, complaint and the stipulation extending the time of the defendants to answer or move with respect to the complaint to and including May 4, 1928, the undersigned will move this Court at a stated term thereof for the hearing of motions to be held at the Court House in the old Post Office Building in the Borough of Manhattan, City, County and State of New York on the 4th day of May, 1928, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order and judgment dismissing the complaint herein on the merits on the ground that it appears on the face of the complaint that the complaint does not [fol. 2] state facts sufficient to constitute a cause of action, and that the Court has not jurisdiction of the subject of the action, and that the plaintiff has not legal capacity to sue, together with the costs of this motion, and for such other and further relief as may be just.

Dated New York, April 28, 1928.

Yours, etc., Simpson, Thacher & Bartlett, Attorneys for Defendants.

Office & Post Office Address: 120 Broadway, New York, N. Y.

To Russell H. Robbins, Esq., Attorney for Plaintiff, 2 Rector Street, New York, N. Y.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS, WITH NOTICE

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District [fol. 4] of New York, at the City of New York, this 9th day of February, A. D., 1928.

Alex Gilchrist, Jr., Clerk. (Seal.) Russell H. Robbins, Plaintiff's Attorney.

Office and Post Office address: 2 Rector St., Borough of Manhattan, City of New York.

To the defendants within named:

Take notice that upon your default judgment will be taken against you for the sum of $983,516.22 with interest from February 9, 1928, and the costs of this action.

Russell H. Robbins, Plaintiff's Attorney.

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[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

The plaintiff, complaining of the defendants, Sidney Z. Mitchell and Neil A. Weathers, as Executors of the last will and testament of Richard Edwards Breed, deceased, upon information and belief for a first cause of action says:

I

That plaintiff is the duly elected, qualified and acting treasurer of the County of Grant in the State of Indiana, of which state he was at the time of the commencement of this suit and now is a bona fide citizen, resident and inhabitant; that by the laws of said state he is authorized and [fol. 6] empowered to institute and prosecute this suit, as hereinafter more particularly alleged:

That the defendants, Sidney Z. Mitchell and Neil A. Weathers, are the duly appointed, qualified and acting executors of the last will and testament of Richard Edwards Breed, deceased; that said defendant Sidney Z. Mitchell at the time of the commencement of this suit was and still is a bona fide citizen, resident and inhabitant of the State of New York, Southern District of New York; and that said defendant Neil A. Weathers at the time of the commencement of this suit was and still is a bona fide citizen, resident and inhabitant of the State of New Jersey.

II

That during each of the years from 1888 to 1926, both inclusive, said Richard Edwards Breed was a bona fide citizen, resident and inhabitant of the State of Indiana and during all of said time had and maintained his residence in said State in the Cit yof Marion, Grant County, Indiana; that during all of the years aforesaid he had and maintained a residence in no other place.

III

That said Richard Edwards Breed died testate on October 14, 1926; that administration was had on his estate in said State of New York, whereby the defendants, named by him in his last will and testament as his executors, have qualified in their said trust and are now engaged in administering said estate as the sole executors thereof; that said [fol. 7] administration is still pending in the Surrogate's Court of the County of New York, in the State of New York, and no distribution of said estate has yet been made.

IV

That during the lifetime of said Richard Edwards Breed and at the time of his death, he was the absolute owner in his own right of large amounts of intangible personal property consisting of bonds, notes, mortgages, accounts, credits, cash on hand and on deposit in bank, and particularly, consisting of large numbers of shares of common and preferred stocks in various business corporations organized and incorporated in states other than the State of Indiana, all of which property, during the respective years of his residence in the State of Indiana, was taxable to him as the owner thereof in Grant County, State of Indiana, under and by virtue of the statutes of the State of Indiana which at all times aforesaid required residents of said state to annually make a full, true and complete disclosure on oath of all bonds, notes, mortgages, accounts, credits, cash on hand and on deposit in bank, and all other personal property owned by them, and of all stocks owned by them in foreign corporations, on March 1 of each of said years of ownership and to state therein the true cash value thereof; and to return said information each year to the proper taxing officials in the township in said State wherein such owner then resided; that by means of said statutes the State of Indiana in each of the years from 1903 to 1926, both inclusive, fixed the taxable situs of foreign stocks, bonds, notes, mortgages, [fol. 8] accounts, credits, cash on hand and on deposit and all other intangible personal property owned by its residents, as the domcile of such residents in the township of their residence in said State of Indiana, so far as pertained to the taxation within said state of said stocks, bonds, notes, mortgages, accounts, credits, cash on hand and on deposit and all other intangible personal property; that at all said times said property was of great value.

That the said corporations, foreign to the State of Indiana, in which said Richard Edwards Breed owned shares of stock as aforesaid during all or part of the times aforesaid, were as follows:

American Gas & Electric Co., a New York Corporation,
American Power & Light Co., a Maine Corporation,
Carolina Power & Light Co., a North Carolina Corporation,
Electric Bond & Share Co., a New York Corporation,

The North American Co., a New Jersey Corporation,
General Electric Co., a New York Corporation,
Central States Electric Corporation, a Virginia Corporation,
Electric Investment Corporation, a Virginia Corporation,
Kansas Gas & Electric Co., a West Virginia Corporation,
Utah Securities Corporation, a Virginia Corporation,
Northwestern Ohio Light Co., an Ohio Corporation,
[fol. 9] Ohio Power Co., an Ohio Corporation,
Ohio Service Co., an Ohio Corporation,
Ohio State Power Co., an Ohio Corporation,
Rockford Electric Co., an Illinois Corporation,
Scranton Electric Co., a Pennsylvania Corporation,
Benton Harbor, St. Joe Railway & Light Co., a Michigan Corporation,
Cape May County Electric Co., a New Jersey Corporation,
Five Mile Beach Electric Railway Co., a New Jersey Corporation,
West Jersey Electric Co., a New Jersey Corporation,
West Virginia Water & Electric Co., a West Virginia Corporation,
Wheeling Bank & Trust Co., a West Virginia Corporation,
Wheeling Electric Co., a West Virginia Corporation,
Kentucky & West Va. Power Co., a Kentucky Corporation,
Asheville Power & Light Co., a North Carolina Corporation,
Yadkin River Power Co., a North Carolina Corporation,
Windsor Power House Coal Co., a West Virginia Corporation,
Fidelity Investment Association, a West Virginia Corporation,
Electric Power and Light Corporation, a Maine Corporation,
Atlantic City Electric Co., a New Jersey Corporation.

That a substantial part of said property so owned by said [fol. 10] Richard Edwards Breed has come into the hands and under the control of the defendants as his executors and the same is now held by them in the State of New York as part of the assets of his estate now in course of administration.

V

That it was the duty of said Richard Edwards Breed as a resident of said State of Indiana and by virtue of the laws

of said State, in each of the years of his residence therein as aforesaid, and on the regular tax assessment date in each of said years, to disclose and return, on oath, to the taxing authorities in said County of Grant and State of Indiana, and in Center Township thereof, in which he resided, all of the said personal property so owned by him on each of said assessment dates, for assessment and taxation for County, City, Civil and School Township taxes to be severally levied according to law by said taxing units respectively;

That in violation of his duty in the premises and of the laws of said State of Indiana, said Richard Edwards Breed made no disclosure or tax schedule and return, as to his ownership or interest in any of said taxable foreign stocks, bonds, notes, mortgages, accounts, credits, cash on hand and on deposit, and all other personal property, but wholly failed to disclose and list any of the same for assessment and taxation in the State of Indiana during any of the years aforesaid; and thereby concealed, sequestered and omitted from taxation in said State all of his said taxable property and unjustly and thereby, in contravention of the laws [fol. 11] of the State of Indiana, escaped assessment for taxation in said State on all of said taxable property.

That neither said Richard Edwards Breed, the present defendants nor any other person or persons has or have paid taxes on any of said property in the State of Indiana or elsewhere for any of the years aforesaid; but all of said property has wholly escaped taxation in said State and in all other States throughout said entire period of ownership of the same by said Richard Edwards Breed, and at all times thereafter.

VI

That at no time prior to the death of said Richard Edwards Breed was it known to the taxing officials of said Grant County or of any of its political subdivisions, including said City of Marion, nor had they nor any of them reason to suspect that said Richard Edwards Breed was, or at any time had been, the owner of any of the intangible personal property aforesaid;

That the statutes of Indiana in force at the times hereinafter mentioned provided that "Whenever the county auditor shall discover or receive credible information, or if he

shall have reason to believe, that any real or personal property has, from any cause, been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate, and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon; to enable him to do which, he is invested with all [fol. 12] the powers of assessors under this act. But before making such correction or addition, if the person claiming to own such property, or occupying it or in possession thereof, resides in the county, and is not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him, at his office, at a specified time within five days after giving such notice, and to show cause, if any, why such property should not be added to the tax duplicate; and if the party so notified does not appear, or if he appears and fails to show any good and sufficient cause why such assessment shall not be made, the same shall be made, and the county auditor shall, in all cases, file in his office a statement of the facts or evidence on which he made such correction. * * * When the county auditor shall discover, or receive credible information, or have reason to believe, that real or personal property has, from any cause, been omitted, in whole or in part, from assessment for taxation, or such credible information shall be furnished to such county auditor, it shall be the duty of such county auditor to take the steps provided for by this section to place such omitted property on the tax duplicate;" said statute being Section 14246 of Burns Annotated Indiana Statutes (1926).

That after the death of said Richard Edwards Breed the auditor of said Grant County received credible information and by reason thereof had cause to believe that large amounts of foreign stocks, bonds, notes, mortgages, accounts, credits, cash on hand and on deposit, and other personal property, hereinbefore referred to, and owned by [fol. 13] said Breed, had been wholly omitted in the assessment of each of the years from 1903 to 1926, both inclusive, from the tax assessment book and tax duplicate of said Grant County; that acting upon said information said

auditor on the 8th day of April, 1927, gave written notice to the present defendants as executors of the last will and testament of said Richard Edwards Breed, of his intention to conduct an official hearing and investigation under said statutes with respect to said ownership and the taxable value of said omitted personal property, and of his intention to add such property to the tax duplicate describing it in general terms, and by said notice required said executors to appear before him, at his office in the Court House in the city of Marion, Grant County, Indiana, on the 15th day of April, 1927, then and there to show cause, if any, why such property should not be added to the tax duplicate of said county; that at the time and place aforesaid, said auditor held such hearing pursuant to the notice above mentioned and on evidence then and there produced before him, found that the aforesaid property had theretofore been owned by said Richard Edwards Breed during each of the years 1903 to 1926, both inclusive, and had unjustly and unlawfully escaped taxation in Grant County, Indiana; and by his official finding upon said evidence, said auditor fixed and assessed the fair and proper taxable value of said omitted property at the following amounts for each of the years here indicated:

| Year | Taxable value |
|---|---|
| 1903 | $310,000.00 |
| 1904 | 345,000.00 |
| 1905 | 383,000.00 |
| [fol. 14] 1906 | 426,000.00 |
| 1907 | 473,000.00 |
| 1908 | 525,000.00 |
| 1909 | 584,000.00 |
| 1910 | 649,000.00 |
| 1911 | 721,000.00 |
| 1912 | 801,000.00 |
| 1913 | 890,000.00 |
| 1914 | 989,000.00 |
| 1915 | 1,098,000.00 |
| 1916 | 1,220,000.00 |
| 1917 | 1,356,000.00 |
| 1918 | 1,507,000.00 |
| 1919 | 1,674,000.00 |

| Year | Taxable value |
|---|---|
| 1920 | 1,860,000.00 |
| 1921 | 2,067,000.00 |
| 1922 | 2,296,000.00 |
| 1923 | 2,552,000.00 |
| 1924 | 2,835,000.00 |
| 1925 | 3,150,000.00 |
| 1926 | 3,500,000.00 |

That upon said taxable values said auditor assessed taxes for State, County, City, Civil Township, and School Township purposes, in the aggregate amount of $1,076,493.50; and upon said taxable values said auditor assessed the following proper amounts of taxes for each of the years indicated, for County, City, Civil Township, and School Township purposes in said Grant County, and its political subdivisions, and exclusive of all taxes due the State of Indiana; which county and each of its political subdivisions aforesaid at all times herein mentioned, were municipal [fol.15] corporations, with power to sue and be sued:

| Year | Taxes |
|---|---|
| 1903 | $8,470.75 |
| 1904 | 8,668.12 |
| 1905 | 9,867.99 |
| 1906 | 10,890.69 |
| 1907 | 11,051.64 |
| 1908 | 13,001.62 |
| 1909 | 14,462.76 |
| 1910 | 18,246.63 |
| 1911 | 19,982.51 |
| 1912 | 22,920.61 |
| 1913 | 30,162.10 |
| 1914 | 36,286.41 |
| 1915 | 45,665.82 |
| 1916 | 50,861.80 |
| 1917 | 59,650.44 |
| 1918 | 73,074.43 |
| 1919 | 28,458.00 |
| 1920 | 48,732.00 |
| 1921 | 61,596.60 |
| 1922 | 60,155.20 |

| Year | Taxes |
|---|---|
| 1923 | 78,601.60 |
| 1924 | 79,663.50 |
| 1925 | 92,295.00 |
| 1926 | 99,750.00 |
| | $982,516.22 |

VII

That the aforesaid taxes were computed by said auditor according to the respective tax rates, exclusive of rates of taxes due the State of Indiana, for each of the several years [fol. 16] aforesaid, which had been previously adopted and levied for each of said years, in conformity with all legal requirements, by the duly constituted taxing authorities of said Grant County, and of each of its several political subdivisions aforesaid, which authorities were charged by law with the levy of said taxes; and said rates so levied were duly and regularly certified by said respective taxing authorities to the auditor of said Grant County pursuant to law; which several tax rates, which were exclusive of all rates of taxes due the State of Indiana, were those applied and enforced by the taxing authorities of said Grant County and its political subdivisions during each of the years aforesaid in the general taxation, other than taxation for the benefit of the State of Indiana, of property belonging to residents of said county and of its several political subdivisions; and were the same rates which, exclusive of rates of taxes due the State of Indiana, would have been applied and enforced in each of said years as to the said omitted property of Richard Edwards Breed, if he had duly and at the proper times returned said property for taxation in said Grant County, Indiana.

VIII

That, pursuant to the statute aforesaid, said auditor thereupon proceeded to correct the tax duplicate of said Grant County and enter said omitted property for taxation by adding to said tax duplicate the omitted property aforesaid, with the foregoing proper valuation thereof, and charged such property and the defendants herein, as execu-

tors of the last will and testament of said Breed, with the above proper amounts of taxes for each of the years above [fol. 17] specified; and said auditor thereupon filed in his office a statement of the facts and evidence on which he made and entered such correction; and at the time of entering said omitted property on the tax duplicate, he deposited in the United States mail, properly addressed to the present defendants as executors aforesaid, written official notice of said assessment; and said auditor has, in all particulars, fully complied with the statutes of the State of Indiana in such cases made and provided;

That there was in force at all the times hereinafter mentioned a statute of the State of Indiana, reading as follows:

"That from any finding, conclusion or decision of any county assessor, any county auditor, any county treasurer or any other officer or officers or board whose duty it may be to investigate, decide, assess and place on the tax duplicate of any county of this state any property subject to taxation and omitted to be returned, listed and assessed for taxation, the owner of such property or other person against whom such omitted property has been assessed shall have the right to appeal from such finding, conclusion or decision to the circuit court of the county wherein said omitted property is so listed or added for taxation: Provided, That such appeal shall be taken within ten days after the entering of such omitted property on the tax duplicate of such county, by the taxpayer or person against whom such taxes are assessed filing his written undertaking with the auditor of such county with security to be ap- [fol. 18] proved by such auditor conditioned to pay, without delay, all taxes, interest, and penalties as may on final hearing be found due, together with costs assessed against him: Provided, also, The officer so entering such omitted property for taxation shall, at the time of entering the same on the tax duplicate, deposit in the United States mail properly addressed to the taxpayer against whom the assessment is made, notice of said assessment: Provided, further, That either party to such proceedings aggrieved by the judgment of such circuit court on such appeal shall have the right to appeal from such judgment to the supreme

court of Indiana, and such appeal shall be taken as other appeals are taken from judgments in civil actions from the circuit court to the supreme court."

That said defendants had reasonable and timely notice of said auditor's hearing and finding, but have prosecuted no appeal therefrom under the foregoing statutes of the State of Indiana providing for such appeals, nor have they taken any steps to question said valuation, assessment or correction of said tax duplicate; but the same are now in full force and effect as originally made by said auditor.

IX

That all of said taxes assessed and entered as aforesaid became due and payable, according to the laws of the State of Indiana, to this plaintiff as treasurer of Grant County, Indiana, on or before May 2, 1927; that none of the same [fol. 19] were then or thereafter paid; that by force of the laws of said State of Indiana all of said taxes immediately after May 2, 1927, became and are now delinquent, and collectible by this plaintiff as delinquent taxes, under and by virtue of the Statutes of the State of Indiana now in force and effect, which provide, with respect to the duties of county treasurer:

"It shall be the duty of the county treasurer to receive and collect all taxes shown upon the duplicate of such city for city purposes the same as he is required by law to receive and collect taxes shown thereon for state, county, township, road and other purposes"; (Burns Annotated Statutes of Indiana (1926) Section 14299);

"Said treasurer, in his name as such officer, may, or whenever requested so to do by the board of county commissioners, shall at any time after delinquency, institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the said delinquent taxes, or a substantial part thereof, can be collected in this or any other state by such suit or proceedings"; (Indiana Session

Laws of 1927, Chapter 54, p. 141, Section 1), which determination, as to the existence of a reasonable probability of collection, was made by this plaintiff prior to the commencement of this suit; that in bringing suit to collect said taxes this plaintiff is proceeding under and pursuant to the statutes of the State of Indiana for the ultimate benefit of said Grant County, said city of Marion, and the civil and school [fol. 20] townships wherein said Richard Edwards Breed resided as aforesaid, which municipal corporations will respectively be entitled to the entire amount collected hereby, after deducting expenses as provided by law.

X

That by reason of the failure of said Richard Edwards Breed to return his said property for taxation or to pay taxes thereon in Indiana during each of the years of his said ownership, he became and at all times thereafter continued to be until his death justly indebted to said Grant County and to its political subdivisions, including said city of Marion, in the amount of such taxes as were justly and reasonably assessable against him on said property for each of said years, as hereinabove set forth; which indebtedness is now due and is wholly unpaid; that prior to the commencement of this suit, plaintiff made demand upon said defendants as executors aforesaid, for the payment of said indebtedness, with which demand said defendants have neglected and refused to comply.

XI

That neither said Richard Edwards Breed, nor the defendants as his executors, at any time attempted to avail themselves of the processes of law provided by the State of Indiana to test the taxability of said property to him as a resident of Indiana, or any other question of law or of fact pertaining to said property or to the ownership, valuation or taxability thereof.

[fol. 21] For a separate and distinct cause of action, plaintiff further alleges:

XII

That he realleges and reaffirms each allegation contained in the preceding numbered paragraphs I to XI, both in-

clusive, to the same effect as if the same were herein set out in full.

XIII

That by reason of the failure of said Richard Edwards Breed to return his said property for taxation or to pay taxes thereon in Indiana during each of the years of his said ownership, he became and at all times thereafter continued to be until his death justly indebted to said Grant County and to its political subdivisions, including said city of Marion, in the amount of such taxes as were justly and reasonably assessable against him on said property for each of said years, as hereinabove set forth; which indebtedness is now due and is wholly unpaid; that prior to the commencement of this suit, plaintiff made demand upon said defendants as executors aforesaid, for the payment of said indebtedness, with which demand said defendants have neglected ahd refused to comply.

XIV

That neither said Richard Edwards Breed, nor the defendants as his executors, at any time attempted to avail themselves of the processes of law provided by the State of Indiana to test the taxability of said property to him as a resident of Indiana, or any other question of law or of fact pertaining to said property or to the ownership, valuation or taxability thereof.

[fol. 22]

XV

That by omitting to return his said property for taxation or to pay taxes thereon in Indiana as aforesaid, said Richard Edwards Breed unjustly, unlawfully and unconscionably withheld from Grant County and its political subdivisions, including said city of Marion, and retained for his own use and benefit a large sum of money each year in which said omission occurred, to the aggregate of $982,516.22, exclusive of all interest and penalties, by which amount, so withheld, representing taxes payable in Indiana on said property as aforesaid, said decedent in his lifetime and his estate at the time of his death were unjustly and unconscionably enriched; which sum said defendants, as said decedent's executors, unjustly and un-

conscionably still retain and thereby deprive said County of Grant and its political subdivisions aforesaid, including said city of Marion, of said moneys reasonably and conscionably due each of them.

Wherefore plaintiff demands judgment against the defendant for the sum of $982,516.22, with interest, and further demands that said sum be adjudged and established as a valid and enforceable claim against the defendants as executors of the last will and testament of Richard Edwards Breed, deceased, to be paid by them out of the assets of said estate in their hands as such executors; and plaintiff prays for costs of this action and all other necessary or proper relief in the premises.

Russell H. Robbins, Attorney for Plaintiff.

Office and P. O. Address: Two Rector Street, Borough of Manhattan, City of New York.

(Verified March 16th, 1928.)

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[fol. 23] In United States District Court

Harry C. Moore, as Treasurer of Grant County, Indiana, Plaintiff,

against

Sidney Z. Mitchell and Niel A. Weathers (Sued as Neil A. Weathers), as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, Defendants

Order Granting Motion to Dismiss—June 22, 1928

This cause having duly come on to be heard on the 18th day of May, 1928, upon the motion on the part of the defendants for an order dismissing the complaint on the merits with costs on the ground that it appears on the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action, that the Court has [fol. 24] not jurisdiction of the subject of the action and that the plaintiff has not legal capacity to sue.

Now, on reading and filing the summons and complaint, stipulation extending the time of defendants to answer or

move with respect to the complaint to and including May 4th, 1928, the notice of motion dated April 28, 1928, with proof of due service thereof and the stipulation adjourning the hearing of said motion to May 18, 1928, and upon hearing Messrs. Simpson, Thacher & Bartlett, attorneys for the defendants, by Louis Connick, Esq., of counsel, in support of said motion and Russell H. Robbins, Esq., attorney for the plaintiff in opposition thereto and upon the briefs submitted by the attorneys for the respective parties and upon filing the opinion of the Court, it is,

Ordered that the motion on behalf of the defendants to dismiss the complaint be, and the same hereby is granted on the ground that the complaint does not state a cause of action of which this Court will take jurisdiction.

Jno. C. Knox, U. S. D. J.

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[fol. 25] In United States District Court

[Title omitted]

Russell H. Robbins, Esq., attorney for plaintiff.

Simpson, Thacher & Bartlett, Esqs., attorneys for defendants (Louis Connick and W. N. Seymour, Esqs., of counsel).

Opinion

Knox, D. J.:

This suit is brought by plaintiff in his capacity as Treasurer of Grant County, Indiana, against the executors of Richard Edwards Breed, deceased, to recover certain taxes which it is said arose, and were incurred by the decedent during his lifetime, and while he was a resident of that State. The executors are residents of New York, and were appointed by authority of the Surrogate's Court of New York County. The property in their possession consists of certain securities which were owned by Breed, but which [fol. 26] were never physically within the State of Indiana. Under the law of New York, as declared by its Court of Appeals, a claim of the character here made against defendants will not be enforced by the local courts. State of Colorado vs. Harbeck, 232 N. Y. 71. Were this Court to

give judgment against the executors, they might find themselves in a highly embarrassing situation, if, after paying a judgment in favor of plaintiff, the court which appointed them should refuse to credit such payment upon the settlement of their accounts.

This possibility, in the absence of certainty that the plaintiff is entitled to maintain the present suit would counsel hesitation before subjecting the executors to the peril to which reference has been made. In such event, I should be inclined to dismiss the complaint, and thus allow the propriety of the suit to be pronounced by an appellate court before permitting a judgment to go against the defendants.

There is, however, another consideration which strengthens my belief that the complaint should be dismissed. It is that plaintiff has not called attention to a single authoritative decision which, under circumstances such as are revealed by the present pleading, permitted the tax collecting officer of a polici*t*al subdivision of one State, or the revenue authorities of such State, to go within the borders of another, and there collect taxes from property that never was within the jurisdiction where the assessment was made, or from persons who were non-residents of the sovereignty which authorized such assessment. The inability of the plaintiff to point to some substantial authority in support [fol. 27] of the proposition which he urged at the bar, and in his brief is due, I think, to the fact, as declared by the State Court of Appeals in the Harbeck case, that private international law "precludes one State from acting as a collector of taxes for a sister State and from enforcing its penal or revenue laws as such," it being "universally recognized that the revenue laws of one State have no force in another." See Wisconsin vs. Pelican Insurance Co., 127 U. S. 265, and New York Trust Co. v. Island Oil & Transport Corp., 11 Fed. (2d) 698.

As a result of what has been said, I do not conceive it to be the duty of this Court, notwithstanding the weight of insistence to the contrary, to undertake the enforcement within the State of New York, of the revenue laws of Indiana. The course of procedure to be followed by a Federal Court, when asked to apply the law of a foreign State in a manner that is not permitted by the law of the State within

which the Court functions, is outlined in Pennoyer v. Neff, 95 U. S. 714, and Packer v. Moore, 115 Fed. 799.

Defendants' motion to dismiss the complaint will be granted.

June 12, 1928.

John C. Knox, U. S. D. J.

---

[fol. 28] In United States District Court

[Title omitted]

Petition for Appeal

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Your petitioner, Harry C. Moore, as Treasurer of Grant County, Indiana, conceiving himself aggrieved by the certain order entered on the 22nd day of June, 1928, in the above entitled action dismissing the complaint upon the ground that the complaint does not state a cause of action of which this court will take jurisdiction, does hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Second Circuit, and prays [fol. 29] that his appeal may be allowed and that a citation may be granted, directed to Sidney Z. Mitchell and Niel A. Weathers, as Executors of the Last Will and Testament of Richard Edwards Breed, deceased, to appear before the United States Circuit Court of Appeals for the Second Circuit, to do and receive that which may appertain to justice to be done in the premises and evidence of said proceedings, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Harry C. Moore, as Treasurer of Grant County, Indiana, Plaintiff. Russell H. Robbins, Attorney for Plaintiff.

---

[fol. 30] In United States District Court

Allowance of Appeal

Appeal allowed August 23, 1928.

Frank J. Coleman, D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes Harry C. Moore, as Treasurer of Grant County, Indiana, the plaintiff herein, and files the following assignment of errors on appeal from the order entered herein on the 22nd day of June, 1928, granting the defendants' motion to dismiss the complaint upon the ground that [fol. 31] the complaint does not state a cause of action of which this court will take jurisdiction:

First. That the court erred in that it failed and refused to take jurisdiction of this action.

Second. That the court erred in holding that the cause of action stated in the complaint was one of which this court would not take jurisdiction.

Third. That the court erred in granting the defendants' motion to dismiss the complaint upon the ground that the complaint did not state a cause of action of which this court will take jurisdiction.

Russell H. Robbins, Attorney for Plaintiff.

Office & P. O. address: 2 Rector Street, Borough of Manhattan, City of New York.

---

[fol. 32] Citation, in usual form, omitted in printing.

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[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said district court in the above entitled action as agreed upon by the parties.

Dated September 8, 1928.

Russell H. Robbins, Attorney for Appellant. Simpson, Thacher & Bartlett, Attorneys for Appellees.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY C. MOORE, as Treasurer of Grant County, Indiana, Plaintiff-Appellant,

against

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (Sued as Neil A. Weathers) as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, Defendants-Appellees

Before Manton, Learned Hand and Augustus N. Hand, Circuit Judges

Appeal from the District Court for the Southern District of New York. Action by plaintiff against the defendants to recover for taxes assessed and not paid. Judgment for the defendants dismissing the complaint; plaintiff appeals. Affirmed.

Russell H. Robbins, Esq., Attorney for Appellant. Russell H. Robbins, Esq., Henry M. Dowling, Esq., of Counsel.

Simpson, Thacher & Bartlett, Esqs., Attorneys for Appellees. Louis Connick, Esq., W. N. Seymour, Esq., of Counsel.

OPINION

MANTON, Circuit Judge:

This action is by the County Treasurer of Grant County, Indiana, to recover taxes alleged to be due and unpaid. [fol. 36] The complaint was dismissed on motion because it did not state a cause of action of which the court would take jurisdiction. The appellees are executors of the last will and testament of Richard Edwards Breed who is alleged to have resided in Grant County, Indiana during the years 1903 to 1926 and did not pay a tax as required by the Indiana Session Laws of 1903 (§ 14288, Burns Rev. Indiana Stat. for 1926). The statute provides that

"All the property, both real and personal, situated in any county, shall be liable for the payment of all taxes, penalties, interest and costs charged to the owner thereof in such county, and no partial payment of such taxes, penalties, interest or costs shall discharge or release any part or portion of such property until the whole is paid; which lien shall in nowise be affected or destroyed by any sale or transfer of any such personal property, and shall attach on the first day of March, annually, for the taxes of such year."

The assessment was made after Breed's death by the Grant County taxing assessors. Authorization to commence the suit is found in the Session Laws of 1927, Chap. 54, p. 141, § 1, which was passed after the death of Breed. It authorizes the treasurer, in his name, as such officer, to institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owed by any person residing outside the State of Indiana and provides that for his services in so doing, the treasurer shall charge and receive 25 per centum of the moneys so collected.

There is no allegation in the bill that any of the deceased's property referred to therein was ever physically within the State of Indiana or that the deceased died there. The first cause of action is based upon an alleged indebtedness of the deceased due for the taxes alleged to have been assessed against the deceased after his death, and the second, on an [fol. 37] alleged unjust enrichment of the deceased and the appellees as executors, because of failure to pay the taxes. No lien is claimed to have been imposed upon any property of the deceased by reason of the proceedings for the assessment of taxes. Thus, only a personal liability is asserted, for taxes which were not liquidated until after the death of the deceased.

Taxes are imposts, not debts, collected for the support of the government. Meriwether v. Garrett, 102 U. S. 472. The form of procedure to collect them cannot change their character. Any contractual or quasi contractual obligation to pay arises out of the assessment. The enforcement of revenue laws rests not on consent, but on force and authority. State of Colorado v. Harbeck, 232 N. Y. 71. An action for debt cannot be maintained to collect a tax in the New York

State courts. City of New York v. McLean, 170 N. Y. 374; Matter of Maltbie v. Lobsitz Mills Co., 223 N. Y. 227. See also, City of Boston v. Turner, 201 Mass. 190. With the appellees and the property without the state, and the estate being administered in New York, the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclude one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution, limited to persons and property within its jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U. S. 265. This court in New York Trust Co. v. Island Oil & Transport Corp. 11 Fed. (2) 698, considered a request for instructions as to whether equity receivers should pay the franchise [fol. 38] taxes of a corporation in receivership where the corporation was organized in the State of Virginia, and there we said that "if the receivers in the exercise of their business discretion deem it expedient to pay this tax, they are authorized to do so; but they are not required to do it, because the State of Virginia has no legal right to demand payment for them." A further question was there presented as to the lawful right to collect taxes out of the estate not within the taxing jurisdiction and from representatives of the taxpayers not within the taxing jurisdiction, and we concluded that there was no legal liability to pay. In State of Colorado v. Harbeck, supra, it was held that the State Court could not be used to collect taxes due a sister state. The action was brought to recover an inheritance tax upon the estate of Harbeck, a resident of Colorado. He died in New York. The will and codicils were probated in New York, transfer tax proceedings were had in New York and the taxes were assessed as upon the estate of a non-resident and paid. No provision was made in the accounts finally settled for the payment of transfer tax to the state of Colorado which had notice of the proceedings in New York. The estate which was assessed for taxation consisted of stocks and bonds, none of which were physically present in Colorado at the time of the decedent's death or thereafter. The complaint was dismissed. The tax laws of one state cannot be given extra territorial effect so as to make collections

through the agency of the courts of another state. Indiana's political sub-division, Grant County, is limited in the payment of taxes to property found within its boundaries. [fol. 39] State of Iowa vs. Slimmer, 248 U. S. 115; Ashley vs. Ryan, 153 U. S. 436; Matter of Anita Bliss, 121 Misc. (N. Y.) 773; Walker vs. Treasurer, 221 Mass. 600; People vs. Kellogg, 268 Ill. 489. In Wisconsin vs. Pelican Ins. Co., 127 U. S. 265 the state of Wisconsin commenced an action of debt in the Supreme Court of the United States against a corporation of Louisiana in which it sought to collect upon a judgment recovered in a Wisconsin court for penalties imposed by the statutes of Wisconsin for not making returns to the insurance commissioner of that state as required by law. Granting judgment for the defendant upon demurrer, the Supreme Court pointed out that "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue * * *."

The appellant's argument that the extra territorial imposition of tax is to be distinguished from the extra-territorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the na- [fol. 40] tional district court outside of the state to collect such tax. But it is said that Blodgett vs. Silverman, 277 U. S. 1, overrules what is said in the Harbeck case. The Blodgett case did not deal with the question of extra-territorial enforcement of state tax statutes which is presented in this case. That case involved the question of whether the State of Connecticut could tax the transfer of certain intangible personal property under a will probated in Connecticut and collect the tax in a Connecticut court against executors appointed by the Connecticut Court of Probate.

The deceased was domiciled in Connecticut at the time of his death. The court decided that intangible personality has such a situs as the domicile of its owner and its transfer on his death may be taxed there. No question of jurisdiction of the State of Connecticut over the executors was presented. The decision in the Blodgett case was limited to upholding a transfer tax upon intangibles in a court which had jurisdiction to tax. That principle is recognized in the cases we have referred to.

Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogate's Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed is determined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a [fols. 41 & 42] succession tax claimed, but a personal property tax. The application of the fiction of mobilia sequuntur personam would require an assessment during each of the years for which taxes are claimed, during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought. Certainly, the court below had not jurisdiction of the cause of action alleged and the complaint was properly dismissed.

Judgment affirmed.

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[fol. 43] In United States Circuit Court of Appeals

[Title omitted]

Concurring Opinion

L. Hand, Circuit Judge (concurring):

Although the Supreme Court of Indiana has not passed upon the question, I think that a personal liability was im-

posed upon Breed before his death, which was after March first. That is the date when the tax is imposed and when the lien attaches to any property within the State. It can hardly be that the lien arises before the liability, and the assessment may be, and in my judgment should be, considered as no more than a liquidation of a liability already existing. Nor does the actual location of the property taxed affect the validity of this tax, which was personal. As to shares in corporations, there has, I think, never been any doubt, and negotiable bonds are now to be considered in the same class, Blodgett v. Silberman, 277 U. S. 1. Had any of the property consisted of chattels, coin or bank notes, situated outside Indiana, another question would have arisen, but this was not the case. Hence it seems to me that the liability was valid; it is not even argued that if so it did not survive.

We must therefore decide whether a tax lawfully imposed in a foreign State can be collected by suit in a Fed- [fol. 44] eral court sitting in another State. Our jurisdiction is in this respect no different from that of a court of the State of New York; the law to be administered is certainly not the law of Indiana, whether it be the law of New York, or whether in such cases there is a common-law independent of the laws of any State. Generally it is of course true that a liability arising under the law of a foreign State will be recognized by the courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of the forum.

A recognized exception is in the case of criminal and penal liabilities, (The Antelope, 10 Wheat. 66, 123; Wisconsin v. Pelican Ins. Co., 127 U. S. 265; Huntington v. Attrill, 146 U. S. 657; Huntington v. Attrill (1893) A. C. 150; Arkansas v. Bowen, 3 App. Dist. Col. 537; Dicey, Conflict of Laws, Rule 54). In some few cases this exception has been extended to include revenue laws as well, (Colorado v. Harbeck, 232 N. Y. 71; Municipal Council of Sydney v. Bull, (1909) 1 K. B. 7; Gulledge Co. v. Wenatchee Co., 122 Minn. 266; Canada v. Schulze, 9 Scotch L. T. 4), but so far as I can find the point has never been passed on by a Federal court.

While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment which includes liabilities for taxes as

well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in foreign States if they run counter to the "settled public policy" of its own [fols. 45 & 46] State. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate, should be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper. For these reasons I concur.

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[fol. 47] In United States Circuit Court of Appeals

Second Circuit

Harry C. Moore, as Treasurer, etc., Plaintiff-Appellant,

v.

Sidney Z. Mitchell et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed Feb. 11, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, ad-

judged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., L. H.

[File endorsement omitted]

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[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

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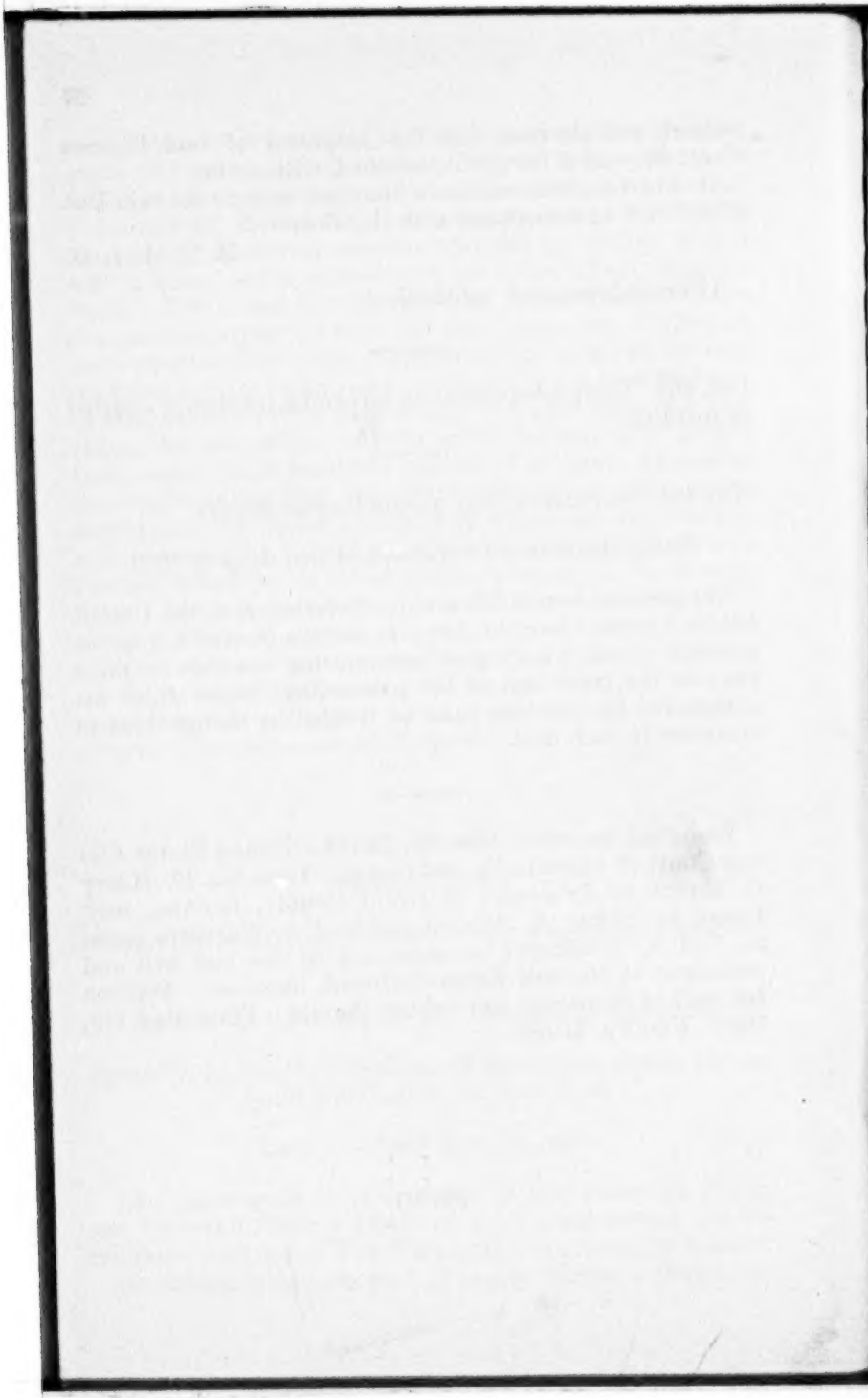
[fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

Endorsed on cover: File No. 34,188. United States Circuit Court of Appeals, Second Circuit. Term No. 79. Harry C. Moore, as Treasurer of Grant County, Indiana, petitioner, vs. Sidney Z. Mitchell and Niel A. Weathers (sued as Neil A. Weathers), as executors of the last will and testament of Richard Edwards Breed, deceased. Petition for writ of certiorari and exhibit thereto. Filed May 4th, 1929. File No. 34,188.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

No. 179

**HARRY C. MOORE**, as Treasurer of Grant County, Indiana, - - - - - Petitioner

vs.

**SIDNEY Z. MITCHELL** and **NIEL A. WEATHERS** (sued as **NEIL A. WEATHERS**), as Executors of the Last Will and Testament of **RICHARD EDWARDS BREED**, Deceased.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

---

**RUSSELL H. ROBBINS,**
Counsel for Petitioner.

**HENRY M. DOWLING,**
Of Counsel.

Wm. B. Burford Printing Co., Indianapolis

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

No.

---

HARRY C. MOORE, as Treasurer of Grant County, Indiana, - - - - - - *Petitioner,*

*v.*

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (Sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, - *Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

---

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Harry C. Moore, respectfully shows:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a decision made and entered in said Circuit Court of Appeals on February 4, 1929, by which a decree of Judge John C. Knox of the United States District Court for the Southern District of New York dismissing the bill of complaint because of lack of jurisdiction of the cause of action was affirmed.

## I.

## STATEMENT.

This suit was brought in the United States District Court for the Southern District of New York by Harry C. Moore as Treasurer of Grant County, Indiana, to recover from the executors of Richard Edwards Breed, now deceased, certain personal property taxes accrued to said Grant County and the municipal subdivisions thereof against the said Breed during his lifetime and while he was a resident of said Grant County (Tr., fols. 15-66).

The defendants are the executors of the last will and testament of the said Breed and are engaged in administering his estate, said will having been probated in the county and state of New York (Tr., fols. 16-19).

This suit is brought under a statute of Indiana specifically authorizing such suit (Tr., fol. 56).

## II.

## THE UNDERLYING QUESTION.

The underlying question which this case presents is whether the federal courts have jurisdiction to entertain suits for the recovery of taxes accrued to municipal corporations extraneous to the territorial jurisdiction of such courts.

## III.

## REASONS FOR REVIEW.

The petitioner submits that the question decided by the Circuit Court of Appeals is an important question of federal law which has not been, but which should be, settled by this Court. The petitioner further submits that the decision of the Circuit Court of Appeals is untenable.

Adequate and effective means of collecting their

revenues are of the utmost importance to the several states and to the municipal subdivisions thereof. If the states and municipal subdivisions may not reach beyond the state borders to collect moneys due to them, they are shorn of all means of recovering substantial amounts of revenue to which they are justly entitled. With the freedom of movement of individuals from state to state and with the frequency with which tax obligations are in arrears, whether through willful default or otherwise, the several states and municipal subdivisions must, unless they can reach beyond the state borders, lose all ability to collect large amounts of the revenue essential to their proper functioning; and any resident of a state may free himself of all enforcible obligation for tax liability by removing from the state while in arrears in payment of taxes, whether his default in payment be innocent or pursuant to a scheme to avoid taxation. To allow a citizen temporarily to avoid taxation by concealment of assets or by other device, and then permanently to avoid any enforcible obligation by the mere expedient of removal, would not only open large opportunity for fraud but would materially prejudice the several states and their municipal subdivisions in the collection of revenue.

The amount in controversy, almost a million dollars, is substantial and is of substantial importance to Grant County and its subdivisions. The principle involved is of importance to all the states and other municipal corporations which share in tax collections.

WHEREFORE, your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, to certify and send to this Court a full and complete transcript of the record herein, to the end that the said case may be re-

viewed and determined by this Court as provided by law, and that the decision of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem meet and just.

And your petitioner will ever pray.

HARRY C. MOORE,
*Petitioner.*

UNITED STATES OF AMERICA
STATE OF INDIANA } ss:
COUNTY OF GRANT

HARRY C. MOORE, being duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

HARRY C. MOORE.

Subscribed and sworn to before me
this 27th day of April, 1929.

E. E. Gowing,
Notary Public for Grant County, Indiana.

[SEAL.]

My commission expires April 27, 1931.

CERTIFICATE.

I certify that I have examined the foregoing petition and that in my opinion the petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this court.

RUSSELL H. ROBBINS,
*Counsel for Petitioner.*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

HARRY C. MOORE, as Treasurer of Grant County, Indiana, - - - - - - *Petitioner,*

*v.*

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, - *Respondents*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Points I and II of this brief deal primarily with the reasons why the Supreme Court should review the decision of the Circuit Court of Appeals. The subsequent points deal primarily with the merits of the petitioner's contention.

## OFFICIAL REPORTS OF DECISIONS IN COURTS BELOW.

HARRY C. MOORE, as Treasurer of Grant County, Indiana, v. SIDNEY Z. MITCHELL et al. (District Court) - - - 28 Fed. (2d) 997

HARRY C. MOORE, as Treasurer of Grant County, Indiana, v. SIDNEY Z. MITCHELL et al. (Circuit Couurt of Appeals) 30 Fed. (2d) 600

## GROUNDS FOR FEDERAL JURISDICTION.

The jurisdiction of the United States District Court for the Southern District of New York rested primarily on diversity of citizenship. On appeal to the Circuit Court of Appeals for the Second Circuit, the decision of the latter court was upon an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States; to wit, the right of a municipal corporation located in the State of Indiana, to sue, in a federal court sitting outside of that state, to recover personal property taxes accrued to said municipality and owing by a former resident thereof. The Circuit Court of Appeals decided the above question in a way untenable, and in conflict with the weight of authority. The cause falls within the jurisdiction of this Court, by virtue of United States Code 1926, Section 347, page 906. (Judicial Code Section 240 a, as amended by Act of February 13, 1925.)

Final judgment herein was rendered by the Circuit Court of Appeals for the Second Circuit on February 11, 1929.

(Tr. p. 42.)

The case, as shown by the complaint, involves the right of the Treasurer of Grant County, Indiana, to sue in the United States District Court for the Southern District of New York to recover from the executors of Richard Edwards Breed, deceased, personal property taxes accrued to said county during the lifetime of said Breed, and owing by him to said county while he was a resident thereof. (Tr. fol. 13 to 66, inclusive.)

The District Court, on motion of defendants, dismissed the complaint on the ground that it did not state a cause of action of which said court would take jurisdiction. (Tr. fol. 67 to 72.)

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed. (Tr. p. 42.)

The cases sustaining the jurisdiction of the Supreme Court are:

As to jurisdiction of federal courts over suits involving local taxation:

*Tennessee* v. *Whitworth*, 117 U. S. 129;
*Supervisors* v. *Rogers*, 7 Wall. 175, 180;
*In re Stutsman County*, 88 Fed. 337.
*In re United Five and Ten Cent Store, Inc.*, 242 Fed. 1005;
*In re Thermiodyne Radio Corp.*, 26 Fed. (2d) 716.

As to right of federal court to entertain jurisdiction over suits to collect taxes:

*Billings* v. *United States*, 232 U. S. 261, 287;
*United States* v. *Chamberlin*, 219 U. S. 250, 262;
*Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237;
*United States* v. *Erie Ry.*, 106 U. S. 327;
*United States* v. *Nashville Ry.*, 249 Fed. 678, 683-684;
*United States* v. *Grand Rapids Ry. Co.*, 239 Fed. 153;
*United States* v. *Minn. Threshing Machine Co.*, 229 Fed. 1019, 1020;
*United States* v. *Mexican R. Co.*, 154 Fed. 519;
*United States* v. *National Fibre Board Co.*, 133 Fed. 597;
*United States* v. *Cobb*, 11 Fed. 76, 79;

*United States* v. *Hathaway*, 3 Mason 324, 325, 326;
*United States* v. *Phelps*, 17 Blatch. 312, 315;
*United States* v. *Pacific R. R.*, 4 Dillon 66, 67-69.

As to the right of a federal court sitting in New York to enforce a liability accrued under tax laws of Indiana:

*Owings* v. *Hull*, 9 Pet. 607;
*Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751;
*Mills* v. *Green*, 159 U. S. 651, 657;
*Dennick* v. *Central R. R. Co.*, 103 U. S. 11, 17;
*Gormley* v. *Bunyan*, 138 U. S. 623, 635.

As to the liability, here sued upon, being a debt, recoverable in the federal court:

*Prudential Casualty Co.* v. *State*, 194 Ind. 542, 143 N. E. 631;
*Mullikin* v. *Reeves*, 71 Ind. 281, 284;
*Funk* v. *State*, 166 Ind. 455, 457;
*Darnall* v. *State*, 174 Ind. 143, 90 N. E. 769 (affirmed in 226 U. S. 390);
*United States* v. *Sherman Co.*, 237 U. S. 146, 153;
*Dumont* v. *United States*, 98 U. S. 142, 144;
*Meredith* v. *United States*, 13 Pet. 486, 493-494;
*Stockwell* v. *United States*, 13 Wall. 531, 546.

## STATEMENT.

During each of the years from 1888 to 1926, both inclusive, Richard Edwards Breed was a citizen, resident and inhabitant of Grant County, Indiana. (Tr., fol. 17.) Breed died testate in 1926. Administration was had on his estate

in the State of New York and defendants are engaged in administering said estate as executors thereof. No distribution of the estate has yet been made. (Tr., fol. 18, 19.)

During Breed's lifetime and at the time of his death, he was the owner of large amounts of intangible personal property consisting particularly of large amounts of stocks of various business corporations foreign to Indiana, all of which property was taxable to him as the owner thereof in Grant County, Indiana. Under the statutes of Indiana, it was Breed's duty to return all his personal property for taxation on March first of each year (Tr. fols. 19-29). Breed made no such returns but on the contrary failed to disclose and concealed his taxable property (Tr., fols. 29, 30). Under the Indiana statutes a personal liability accrued annually against him on March first of each year, although it remained unliquidated until after his death. Neither Breed nor the present respondents have paid any taxes on the property in question (Tr., fol. 31).

Prior to Breed's death, it was unknown to the taxing officials of Grant County that he was the owner of intangible personal property liable to taxation (Tr., fol. 32). After his death, the Auditor of Grant County received information that large amounts of intangible personalty owned by Breed had been omitted in the assessment of each of the years 1903 to 1926, both inclusive, and after a hearing fixed and assessed the fair and proper taxable value of said omitted property for each of said years and upon such taxable values assessed taxes for the said years for county, city, civil, township and school township purposes in said Grant County and its political subdivisions, and exclusive of all taxes due the State of Indiana, aggregating $982,516.22 (Tr. fols. 32-45). None of these taxes have been paid (Tr., fol. 54).

The petitioner, as Treasurer of Grant County, Indiana, is by statute specifically authorized to maintain the present action (Tr., fols. 54-58).

This case was heard in the District Court upon the complaint and notice of motion for judgment (Tr. fols. 2-4).

## ARGUMENT.

### I.

**The question decided by the Circuit Court of Appeals is a question of Federal law which has not been settled by this court.**

The underlying question is one of federal law—whether a court of the United States will entertain jurisdiction to enforce liability for taxes accrued to a municipal corporation extraneous to the territorial jurisdiction of such court. The particular form in which this question is presented is whether a federal court will so entertain jurisdiction where the taxes involved are personal property taxes, accrued to a municipal corporation from a resident thereof during the time of such residence and constituting a personal liability of such resident.

Exhaustive research by counsel for the petitioner has failed to discover any case in which either this Court or the lower federal courts have passed upon this question.

Decisions in state courts are at least meager on the question of whether state courts will entertain jurisdiction for the recovery of taxes due to another state or to the municipal subdivisions thereof, and this question is unsettled in at least almost all of the states, and in any case, each sovereignty determines the jurisdiction of its own courts, and federal courts are not bound by the policy of the several states nor the decisions of state courts, such decisions being of force in the federal courts only in so far as their reasoning may be persuasive. Moreover, the relationship existing between the nation and the several states thereof is so radically different from the relationship existing between the several states of the nation that reasons which might actuate a state in denying the use of its courts to the municipal sub-

divisions of another state would be wholly absent when relief was sought in the courts of the nation.

It is a general rule that the courts of one jurisdiction will not enforce the criminal or penal laws of another jurisdiction. The prevailing opinion in the Circuit Court of Appeals makes no distinction between criminal and penal cases and revenue cases, and indiscriminately applies decisions in criminal and penalty cases to the instant case. Judge Learned Hand in his concurring opinion recognizes the distinction and states that so far as he can find no federal court has ever passed on the point as to whether in revenue cases an exception is to be made to the rule that a liability arising under the law of a foreign state will be recognized by the courts of another. Judge Hand said (Tr., p. 40):

> "Generally it is of course true that a liability arising under the law of a foreign state will be recognized by the courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of the forum. A recognized exception is in the case of criminal and penal liabilities. * * * In some few cases this exception has been extended to include revenue laws as well, * * * *but so far as I can find the point has never been passed on by a federal court.*" (Italics ours.)

Judge Manton's opinion in the Circuit Court of Appeals cites *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (Tr., p. 37). That case involved a penalty statute only, and, therefore, did not decide the present underlying question. An action of debt was commenced in the Supreme Court by the State of Wisconsin against a corporation of Louisiana, based upon a judgment recovered

in a Wisconsin state court for a penalty incurred by the corporation in failing to file certain annual statements required by the Wisconsin statutes. Demurrer to the original jurisdiction of the Supreme Court was filed on the ground that the suit was one for the enforcement of a penalty or forfeiture, was a suit penal in its character and was not a "controversy of a civil nature" within the meaning of these words in Section 687 of the Revised Statutes (p. 269). The holding of the court was that original jurisdiction of the Supreme Court of controversies between a state and a citizen of another state embraced controversies of a civil nature only within the meaning of the section referred to and that a suit to enforce a penalty was not such a controversy, regardless of the form of action provided for the recovery of such penalty in the state court.

Judge Manton also cites the case of *New York* v. *Island Oil & Transport Corporation,* 11 Fed. (2d) 698. Since this was a decision of the court which decided this case below, it may be unimportant whether the decision covered the present underlying question. It is submitted, however, that the decision did not cover the question at bar. An annual franchise tax was levied upon a Virginia corporation by the State of Virginia after such corporation had been placed in the hands of receivers appointed by the federal court in New York. After the receivers were appointed, Virginia continued to assess the franchise tax upon the *corporation,* exactly as it had done previously. The receivers asked the instruction of the court appointing them, as to whether or not they should pay the tax *for the year subsequent to their appointment, in priority to the claim of general creditors.*

At no time since the receivership had there been any assets of the company in Virginia. The receivers took the position that as a matter of "comity, equity and

expediency" the taxes should be paid, because of the possibility that, if not paid, the company's charter might be revoked by the State of Virginia, which action would embarrass the receivers in the collection and distribution of the corporate assets. The District Court ordered the payment of the tax, and the creditors' committee appealed.

The Circuit Court of Appeals held that the tax might properly be paid by the receivers, in their discretion. That was the extent to which the order of the District Court went and it was affirmed. Whether or not Virginia could demand the franchise tax as a matter of legal right was not before the court, and therefore could not be authoritatively decided.

The court's discussion of Virginia's legal right to demand the tax, being *dictum,* was based upon the grounds, (1) that no property of the corporation had ever been within the State of Virginia during the year for which the tax was assessed; (2) that the assets of the corporation had all been in the hands of the federal receivers in New York, where they were subject to the claims of general creditors and Virginia had acquired no preferential lien upon them as against unsecured creditors, for they had never been within that state; (3) that having no preferential lien against the assets in the hands of the receivers, Virginia had no authority to lay a tax against the receivers themselves, for they had never operated within that state, or to impose any lien whatever upon assets which had always been in the hands of said receivers in New York; (4) that the license tax imposed by Virginia against the corporation, after the receivers were appointed, did not attach as a matter of law to the foreign receivers.

That these were the grounds upon which the decision rested, and not the broad proposition that taxes of one

state can never be enforced in another, is conclusively shown by the citation of *Franklin Co.* v. *New Jersey*, 181 Fed. 769, 104 C. C. A. 629, which, Judge Hough states, covered the matter then before the federal court in New York. In the *Franklin County* case, the franchise tax was clearly distinguished from an ordinary tax, and was regarded as "not a tax at all" but an arbitrary, obnoxious and discriminatory imposition upon a corporation without regard to the value of its property or its franchises, and in the nature of a license fee. The court in the *Franklin County* case expressly excluded from consideration cases of ordinary taxes, by saying (p. 769):

> "The proposition as to what might be the status in this jurisdiction of a New Jersey tax levied upon property, under rules which exclude the idea of disproportion and arbitrary imposition, has no bearing whatever upon the question before us."

The cited case, as did the *New York Trust Company* case, involved a claim to a preference over all unsecured creditors of the insolvent corporation, and did not present the question whether the claim, as non-preferential, should be allowed. Particular stress was laid in the *Franklin County* opinion (and inferentially in the *New York Trust Company* case) on the fact that the corporation was a mere shell; that it had no assets in the state of its creation during the year the franchise tax was levied; that it did no business there; and that foreign creditors, who dealt with it on the faith of its assets in their state, should not be postponed to the license fee assessed by the parent state against an insolvent concern. It was conceded that taxes accrued prior to the receivership might perhaps be proved and enforced in the federal proceedings, the court saying (p. 774): "If they (the license fees) had accrued before the bill now before us was filed, they might

stand, perhaps, as a claim to be proved, either secured or unsecured."

That the *New York Trust Company* case was not intended to determine the question now before the court is further shown by its citation of *Holshouser Co.* v. *Gold Hill Co.*, 138 N. C. 248, 50 S. E. 650, and of *Ballou* v. *United States, etc., Co.*, 67 N. J. Eq. 188, 59 Atl. 331. In the former, the question related solely to the right of preference of a foreign state over local creditors of an insolvent corporation chartered by the foreign state, but whose assets were being administered in the local state; the foreign state claiming priority of payment as to its annually assessed license fee. The court expressed itself as entirely willing to entertain the claim, but not to give it priority over domestic creditors. In the *Ballou* case, there were involved only state license fees which had accrued *after the corporation had been placed in receivership*. No general tax was considered.

## II.

**The question decided by the Circuit Court of Appeals is of importance and should be settled by this court.**

The importance to the several states and to all other municipal corporations of knowing whether they can collect revenues due to them by instituting proceedings in the federal courts sitting outside the state, or whether in the collection of their revenues they are limited to such action as they can take within the territorial limits of the state is of manifest importance. Municipal corporations can never know their rights in this matter until the question has been passed upon by this Court. Unless this Court shall decide that the federal courts have jurisdiction of suits to collect taxes due to states or other municipal corporations outside the territorial juris-

diction of the court, the several states and other municipal corporations, because of the necessity of litigation and the uncertainty as to the outcome, may, and undoubtedly in many cases will, refrain from any attempt to collect taxes due from persons, formerly their own taxable citizens, who have departed from their borders.

## III.

**The exception, that criminal and penal liabilities will not be enforced in another jurisdiction, should not be extended to include civil liabilities arising under revenue laws.**

The petitioner is in entire agreement with the reasoning in the concurring opinion of Judge Learned Hand, except that he dissents from the final conclusion, that the exception above referred to should be extended to include obligations arising under revenue laws.

Judge Hand, deciding this question as one of first impression in the federal courts, states that in some few cases, in other courts, the exception has been extended to include revenue laws (Tr., p. 41). He cites four cases as instances.

The petitioner believes that the case of *Colorado* v. *Harbeck,* 232 N. Y. 71, cannot properly be so construed. A full discussion of this case is contained in Point VI of this brief.

The petitioner agrees that in the case of *Municipal Council of Sydney* v. *Bull,* (1909) 1 K. B. 7, the court was of the opinion that action could not be brought in one country to enforce the revenue laws of another country, but calls attention to the fact that the exact decision was that it was not the intent of the Australian statute, which authorized collection by suit, to authorize suit beyond the confines of the Colony, coupled with the fact that the

action in question was a mixed action and, therefore, not transitory in nature.

The case of *Gulledge Bros. Lumber Co.* v. *Wenatchee Land Co.*, 122 Minn. 266, decided that the provision of a Washington statute, to the effect that no corporation should be permitted to commence or maintain any suit in any court of that state without alleging and proving that it had paid its annual license fee last due, was not operative outside the State of Washington to prevent the maintenance of suit. The statute in question had been construed by the Supreme Court of Washington as a revenue act but the Minnesota court treated the provision referred to as a penal provision and so explicitly characterized it. Penal provisions of revenue acts are no more enforcible outside the state than are any other penal provisions. As the point Judge Hand was making was the distinction between revenue acts and penal acts, the *Gulledge Bros.* case does not serve as an illustration merely because the penal provision was found in a revenue act.

The case of *Attorney General for Canada* v. *William Schulze & Co.*, 9 Scots Law Times (1901-1902) 4, was a suit for the collection in Scotland of court costs incurred in Canada in the unsuccessful defense of an action to forfeit certain merchandise for an alleged infraction of the Canadian revenue laws. The suit in which the costs were incurred was highly penal. The basis of the decision in the Scotch court was that the imposition of costs constitutes an additional punishment, and also that the expenses of an action are always regarded as a mere accessory or incident of the principal claim.

Therefore, with the possible exclusion of the *Municipal Council of Sydney* case, none of the cases cited by Judge Hand are illustrations of the alleged exception.

Dicta are found in various cases to the effect that revenue acts are subject to the same exception as criminal

and penal laws, but the research of counsel for the petitioner has failed to discover any cases in which the point was actually decided and applied.

Between penalties, which are inherently punitive, and analogous to the sanctions of criminal law, as to which the enacting state exercises sole jurisdiction, and the present civil cause of action, there is absolutely no analogy, either under authoritative precedent or in reason.

Penalties and punishments are inflicted to preserve the domestic order of the state and to prevent a repetition of the offense within the enacting state, and hence are intended to have only a local application and enforcement. This can best be accomplished by meting out punishment in that state only, and not in some remote territory. "The proper place for punishment is where the crime is committed."

> *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 291.

The enforcement of criminal or penal sanctions is peculiarly a matter of local jurisdiction. The punishment of crime or the imposition of a penalty is determined by the degree of criminality or culpability. The question of the extent of a fine or other punishment is properly governed by local considerations and is a matter of judicial discretion. The duty of exercising such discretion is one which a foreign court could not well perform. Further, a penalty is subject to the control of the executive of the state by which the proceeding was authorized and it may be, at any time either before or after judgment, annulled by a pardon. A pardon, however, could not affect a judgment rendered in another jurisdiction.

> *Boston & M. R. R. Co.* v. *Hurd*, 108 Fed. 116; *Malloy* v. *American Hide & Leather Co.*, 148 Fed. 482.

Judge Hand points out the objections to passing on provisions for the domestic order of another state, and bases his conclusion on the premise that revenue laws fall within the same reasoning. He says (Tr., p. 41):

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in foreign states if they run counter to the 'settled public policy' of its own state. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic state to a position which would be of serious moment to the foreign state. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper. For these reasons I concur."

Judge Hand's reasoning is wholly inapplicable to revenue laws. Suits for the recovery of obligations accrued under revenue laws are mere suits for money judgments. The only relation between the foreign state (or its subdivisions) and its citizen is that of creditor and debtor. No relationship between the states is involved. The court can only render judgment for the amount of the tax obligation or refuse to render such judgment. While the matter may be of serious moment to the foreign state, an adverse judgment can be no more detrimental to the interests of the foreign state than a refusal to entertain the suit. Although revenue laws affect a state and its municipalities in matters as vital to their existence as criminal laws, the only vital concern is that the revenues be collected, and to refuse to entertain jurisdiction is to refuse relief in a matter which Judge Hand states is vital to the state's existence. Certainly, therefore, the vitality of the foreign state's concern is no reason for refusing relief.

Judge Hand reasons that the domestic state reserves the right to scrutinize the liability imposed by criminal and penal laws of a foreign state, because of the possibility that such liability might not accord with the policy of the domestic state. But no such clash with domestic policy could, under any circumstances, arise as to a property-tax liability *in personam* created by the foreign state; for the public policy of every state is, that taxes on property should be paid to the public corporations imposing them. Tax paying, not tax evasion, is consonant with public policy everywhere.

The position of the State of Indiana with respect to the rights of Grant County in the pending controversy has been made clear by that state itself. The statutes pronounce that personal property taxes shall become personal obligations of residents in each year. Assessment has

been made in the manner provided by statute. This action has been instituted under a statute specifically authorizing such suits, by an official therein specifically designated for that purpose. The only question involved is whether the money claimed in the complaint is due to Grant County, Indiana, and the municipal subdivisions thereof.

The inquiry necessary to determine whether comity will be extended, therefore, concerns no delicate questions between Indiana and its citizens or between Indiana and any other state, nor any policy of the State of Indiana, except a policy to which it has plainly and unquestionably committed itself. It is necessary for the federal court only to determine whether the Indiana laws in question agree with its own notions of what is proper. These laws are ordinary personal property tax laws. There can be no question as to their propriety.

The arguments advanced by Judge Hand are based on the difference of jurisdiction only and not on any territorial consideration, and apply with full force to the enforcement by federal courts of criminal and penal laws of the state within which the court sits. Consistently therewith, a federal court will not enforce a penal law *even of the state in which the federal court sits.*

> *State of Indiana* v. *Alleghany Oil Co.*, 85 Fed. 870;
> *Perkins* v. *Boston Co.*, 90 Fed. 321;
> *Stickienoth* v. *Central Exchange*, 99 Fed. 1;
> *Hamilton* v. *Schlitz Brewing Co.*, 100 Fed. 675.

The reason for non-enforcement is, that the federal and state sovereignties are distinct and independent. Offenses against one are not necessarily offenses against the other. Therefore the federal sovereignty sitting in New York

will not punish infractions of the penal laws of the state sovereignty of New York, nor of any other state.

> *Huntington* v. *Attrill*, 146 U. S. 657, 672;
> *Southern Ry. Co.* v. *State*, 165 Ind. 617, 75 N. E. 273.

As was held in *State of Indiana* v. *Alleghany Oil Co.*, 85 Fed. 870, 873:

> "The penal laws of the several states of the United States are regarded, so far as the jurisdiction of the United States is concerned, as laws of a foreign country."

If revenue laws fell within the reasoning applicable to criminal and penal laws, federal courts should refuse to recognize or enforce the revenue laws even of the state in which they sit. But, on the contrary, federal courts enforce such laws.

Federal courts take jurisdiction of suits brought for the specific purpose of compelling local tax officials to take steps to collect local taxes.

> See *Tennessee* v. *Whitworth*, 117 U. S. 129.

Thus, the right to issue a writ of mandamus has long been recognized as possessed by federal courts, to force state or municipal taxing officers to perform their duty in levying or collecting local taxes, or to cause them to be collected.

> See *Supervisors* v. *Rogers*, 7 Wall. 175, 180.

The federal court may assume jurisdiction over a case on removal which involves enforcement of local taxation against the removing party.

> *In re Stutsman County*, 88 Fed. 337.

The above conclusion is strengthened by the policy of the Federal Government in opening its courts to states or their subdivisions for the collection of their tax claims in bankruptcy proceedings. Section 64a of the bankruptcy act directs the trustee to pay "all taxes legally due and owing by the bankrupt to the United States, *state, county, district or municipality,* in advance of the payment of dividends to creditors, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court." (Italics ours).

Under this section, state taxes have been allowed and paid in districts located outside the taxing state; the federal courts refusing to confine the statute to local taxes only.

> *In re United Five and Ten Cent Store, Inc.,* 242 Fed. 1005 (District Court, S. D. N. Y.);
> *In re Thermiodyne Radio Corp.,* 26 F. (2d) 716 (tax claim of New York allowed in District of Delaware).

Since, then, territorial considerations are not the determining factor in the refusal of federal courts to enforce the criminal and penal laws of states, the territorial factor should not be interjected into the consideration of whether federal courts will enforce obligations arising under the revenue laws of states. Since the federal courts enforce revenue laws of the states in which they sit it follows that they should equally enforce revenue laws of other states.

This practice of the national courts indicates that tax liability, whether regarded technically as a debt or not, is such a claim or demand in the hands of states and their subdivisions, that it will be enforced in any federal court having jurisdiction of the bankruptcy proceedings. Such an attitude is wholly inconsistent with the theory that

federal courts do not aid in the collection of taxes assessed outside their districts.

In the *Harbeck* case, discussed in Point VI hereof, revenue acts were classified with criminal and penal laws. The *Harbeck* decision assumed the classification and made no endeavor to support it by reason. The *Harbeck* case was decided on a point of constitutional law and advances no reason for refusing to entertain jurisdiction of suits for tax obligation arising in another state if such jurisdiction may constitutionally be assumed. However, the *Harbeck* decision was based upon a conception of tax liability radically different from the conception of such liability entertained by the federal courts. The *Harbeck* decision is representative of a conception of tax liability entertained by some of the states, to wit: that tax acts impose no obligation that is enforcible except under the express or implied terms of the act providing for the tax; that taxes may not be collected except in accordance with the provisions of the act, and that unless there be some statutory authority in the act no action for collection will lie; that taxes are not debts, and that no interest runs on delinquent taxes unless so expressly provided by the statute.

IV.

**Personal property taxes, under the laws of Indiana, were due and became the personal obligations of taxpayers in each year, whether or not the amount thereof had been fixed by assessment. The obligations here sued upon became the personal obligation of the decedent in each year of his residence in Grant County, and were his personal obligation at the time of his death. No assessment was necessary to fix the liability.**

Under Indiana law, general property taxes are a *personal* liability of the owner. As held in *Prudential Casualty Co.* v. *State,* 194 Ind. 542, 143 N. E. 631:

"We think that it should be regarded as settled in this state that general taxes constitute a personal liability against the owner of the property upon which the assessment is based. Taxes, as distinguished from assessments for local improvements, are imposed on the person, rather than on the property which is resorted to merely for the purpose of ascertaining the amount. The weight of authority is that where taxes are viewed as creating a personal liability, the state" (here, the county) " is not restricted to the methods of collection prescribed by statute, but may maintain an action at law therefor."

*Mullikin* v. *Reeves,* 71 Ind. 281, 284;
*Funk* v. *State,* 166 Ind. 455, 457;
*Darnall* v. *State,* 174 Ind. 143, 90 N. E. 769 (affirmed in 226 U. S. 390).

The statutes of Indiana effectively stamp the tax liability as a personal obligation, and they leave no doubt that it is not merely a liability *in rem.*

Burns' Stats. 1926, Sects. 3229, 14246, 14204, 14194, 14048, 14052, 14349, 14387, 14299, Acts 1927, p. 142.

A lien upon all property as security for the current year's taxes attached on March first of each year. The statutes read:

"*All the property,* both real and personal, situated in any county, *shall be liable for the payment of all taxes,* penalties, interest and costs, *charged to the owner thereof* in such county, and no partial payment of such taxes, penalties, interest or costs shall discharge or release any part or portion of

such property until the whole is paid; *which lien* shall in nowise be affected or destroyed by any sale or transfer of any such personal property, *and shall attach on the first day of March, annually, for the taxes of such year.*" (Italics ours.)

Burns' Stats. 1926, Sect. 14288.

"The lien of the state for all taxes for State, County, School, road, township and all other purposes, and all taxes for city, town or municipal purposes, shall attach on all real estate on the first day of March annually."

Burns' Stats. 1926, Sect. 14383.

The personal obligation arises at the same time that the lien attaches. There can be no lien unless there is a liability which it secures. A lien is necessarily predicated on an obligation, which must be in effect at the time the lien arises. On this point the opinion of Judge Learned Hand is clearly sound, in stating:

"I think that a personal liability was imposed upon Breed before his death, which was after March 1. That is the date when the tax is imposed and when the lien attaches to any property within the State. It can hardly be that the lien arises before the liability and the assessment may be, and in my judgment should be, considered as no more than a liquidation of a liability already existing. * * * Hence it seems to me that the liability was valid."

The term "lien" connotes "liability," and was obviously used by the legislature with that implication.

*Vidal* v. *South Amer. Co.*, 276 Fed. 355, 870;
*In re Ransford*, 194 Fed. 658, 115 C. C. A. 560;

*Hardin* v. *Kelley,* 144 Fed. 353, 75 C. C. A. 355;
*Hubble* v. *Berry,* 180 Ind. 513, 103 N. E. 328, 330;
*Bell* v. *Hines,* 16 Ind. App. 184, 44 N. E. 576, 577.

The Indiana decisions fully support the foregoing conclusions. These hold, without variation, that the lien and the individual obligation arise at the same time, viz., on March 1. Thus, in *Barnum* v. *Rallihan,* 63 Ind. App. 349, 112 N. E. 561, 565, the court said:

> "Where taxes have accrued upon the real estate of a person before his death, *they become a charge against him, as well as a lien upon all his property,* and such taxes should be paid by his executor or administrator out of the personal estate if sufficient for that purpose * * *. By the statute the taxes for each year attach and become a lien upon both real and personal property on the 1st day of March annually, though the same are not due and payable until the following year, and will not become delinquent until after the first Monday in May. *While not expressly so stated, our decisions seem to treat all taxes as accruing on the first day of March when the lien thereof attaches to the property assessed.* (Citing Indiana cases.) The taxes which accrued and became a lien upon the testator's undivided one-half of the aforesaid northwest quarter section of real estate on March 1, 1910, prior to his death, were a claim against him, and should have been paid by the executrix out of his personal estate." (Italics ours.)

In *Beard, Treas.,* v. *Allen,* 141 Ind. 243, 248, the court regarded the existence of the lien and the existence of per-

sonal liability of the property owner as arising simultaneously. At p. 248 it was said:

> "It appears from the provision of the tax law cited that *this lien is made perpetual for all taxes due from the owner,* and that all property owned by the tax debtor, both real and personal, situated in any county, is made liable for the payment of all taxes *charged to him or her.* * * * The liability thus incurred ceases only with payment." (Italics ours.)

It is obvious that there is a difference, as to the character and extent of personal obligation during the current year, between a resident who owns taxable property on March 1, none of which he returns for taxation, and a resident who acquires taxables after March 1. Both are under a *general* civic duty to pay taxes. But that duty becomes *definite, specific* and *personal* on March 1 of each year, with respect to the property owned on that date. If no property is then owned, no tax then accrues. The property owner is, by law, made an assessor of his own property as of March 1, annually. (Burns' Stats. 1926, Sect. 14100); his assessment to stand unless altered by the tax officials. (*DuBois* v. *Board,* 4 Ind. App. 138, 30 N. E. 206.) If such owner fails to perform this duty as an assistant of the taxing authorities, but conceals his property and places no value upon it, neither he nor his estate should thereafter be permitted to take advantage of his delinquency by attempting to avoid the personal liability which, if he had performed his duty by disclosure and valuation, would unquestionably have attached on March 1, and which did then attach as to every owner who complied with the law.

After March first the taxes are liabilities of the taxpayer, even before assessment; and after his death they

are liabilities of his estate, even though there be no assessment until after his death. *Assessment is not a condition precedent to the liability of the estate to pay such taxes.*

The statute, authorizing payment of taxes by an executor, reads:

> "Unless otherwise provided in this act, the *debts and liabilities* of a decedent, shall, if his estate be solvent, be paid in the following order of classes. * * * *Fourth.* Taxes *accrued* upon the real and personal estate of the decedent at his death." (Italics ours.)
>
> Burns' Stats. 1926, Sect. 3229.

In *Buck* v. *Miller, Treas.,* 147 Ind. 586, 598, the county treasurer assessed omitted taxes on personalty in Indiana, owned by Nash, such assessment being made *after his death,* but covering 12 years prior thereto. In sustaining the action of the treasurer, the court said, p. 598:

> "He" (Nash) *died owing certain taxes which he had avoided paying for a great many years. Those taxes have now been assessed* in pursuance of statutory provisions for the assessment of omitted property. The taxes are a lien on all property in the county belonging to his estate. This lien can be released only by payment of the taxes. *He could not by giving away his property relieve it of the burden cast upon it by the law.*" (Italics ours.)

In *Graham* v. *Russell, auditor,* 152 Ind. 186, 189, the auditor sought to set aside the final report filed in the estate of Graham, and to reopen the estate. The complaint alleged that decedent died on July 29, 1895, "leaving a liability for taxation due against his estate for

state and county purposes to the amount of $3,000 on account of his failure to list and return all of his property for taxation;" for which amount it was alleged his estate was still indebted.

There had been no assessment of the omitted property prior to the filing of the final report and discharge of the executor, nor prior to the filing of the petition to open the estate, the omission not having been discovered until June 1, 1897.

The court held that the taxes had *accrued in the lifetime of the testator* and constituted an existing obligation at the time the estate was closed. The auditor's petition was granted.

The court said, p. 192:

> "Appellee was, at least, interested * * * in seeing that the taxes, which had accrued by reason of the omitted property, should be paid by the estate of the defaulting decedent * * *. The estate in question, it appears, had been finally settled and its assets turned over to appellant, leaving the matter in regard to the taxes now in controversy still virtually pending unsettled *as a liability for which the estate should account* * * *.
>
> "The facts disclose that the decedent had for many years prior to his death failed to list and return for taxation a large amount of his property, and at his death it is charged he was liable for the payment of taxes, on account of his said default, in the sum of $3,000 and over, *which had accrued and were due* for state, county, and township purposes. * * * He, while in life, owed as one of the highest duties to the government, the duty to pay all taxes imposed upon his property liable to taxation. As a compensation for the dis-

charge of this duty, the state afforded him protection to his life, liberty, and the due enjoyment of the property with which he had been blessed, and the discharge of this duty, if the decedent is shown to have omitted it, must rest upon his estate. *With or without knowledge of the existence of this liability of her decedent, it existed all the same against the property of his estate until paid,* unless barred by some provision of law.

"*With this charge or liability against the estate,* she, immediately after the expiration of the year allowed by law, procured it to be declared by the court as finally settled, and secured her discharge from further administration of her trust. * * * It follows from what we have said that the petition is sufficient." (Italics ours.)

In *Henderson* v. *Whitinger, Adm.*, 56 Ind. 131, 132, the court declared:

"Where taxes have accrued upon the land of a person before his death, they become a *personal charge* against him *as well as a lien upon the property;* and it seems to us that such taxes should be paid by the executor or administrator, because they are *debts against the estate.*" (Italics ours.)

The annual accrual of the personal liability as a present obligation on March 1 is not prevented by the exact amount of taxes not being ascertained (i.e., liquidated) until a later date. Numerous analogies in the law show that the personal obligation may exist prior to the ascertainment of its precise extent. There may be a stockholder's existing statutory liability for undetermined corporate debts; a surety's liability for the principal's unliquidated obligation; undetermined claims filed in bank-

ruptcy; unliquidated demands used as set-off; unmatured obligations chargeable against a decedent's estate under Burns' Stats. 1926, Secs. 3155, 3156. An apt analogy is, the personal obligation for unascertained customs duties owing the Government. All dutiable goods entering the United States, subject the consignee to *personal liability*, even before the precise amount of duty is determined. As held in *United States* v. *Cobb*, 11 Fed. 78, quoted with approval in *United States* v. *Sherman Co.*, 237 U. S. 146, 153:

> "The summary proceedings which the customs officers are required by law to take against the goods are in the nature of proceedings *in rem*, but are not the sole remedies of the government for the collection of its duties. * * * The act makes the duties a *personal debt or charge upon the importer, which accrues to the government immediately upon the arrival of the goods at the proper port of entry. They are due although the goods have been smuggled or for any reason have never come to the hands of the customs officers*, or the statutory proceedings have never been instituted, or through accident, mistake or fraud no duties or short duties have been paid; and the importer is not discharged *from his debt* by a delivery to him of the goods without payment." (Italics ours.)

Accord,

*Dumont* v. *United States*, 98 U. S. 142, 144.

Goods smuggled or never coming into the hands of the customs officers are similar in status to property omitted from the owner's tax lists. In the one case the customs duties, and in the other the taxes, are "accrued" and

"due" from the owner forthwith; even before the public officers are aware of the property's existence. The owner's obligation is *debtum in presenti, solvendum in futuro.*

*Meredith* v. *United States,* 13 Peters, 486, 493, 494;
*Stockwell* v. *United States,* 13 Wall. 531, 546.

As held in *Meredith* v. *United States, supra:*

> "The question has also been asked, at what time the right of the government to the duties *accrues* in the fiscal sense of the terms. The answer is, *at the time when the goods have arrived at the proper port of entry.*" (Italics ours.)

Similarly it can be asked: "At what time did the right of Grant County to the taxes on Breed's taxable property accrue?" The answer is: "At the time the goods should have been disclosed to the taxing authorities; viz., March 1 of each year."

On the taxing date of each year in which a tax return is omitted there arises a vested right to the taxes collectible if the property had then been returned for taxation as required by law. This vested right is possessed by the several subdivisions entitled to receive the taxes. It has been expressly recognized by the Supreme Court of Indiana. In *Reynolds, Auditor,* v. *Bowen, Adm.,* 138 Ind. 434, 447, the court said:

> "If these taxes were unpaid, they belong to the state. They are the state's property, and the right of the state to them never ceased."

Again, in *Saint, Treas.* v. *Welsh, Exr.,* 141 Ind. 382, 388:

> "The right of the State to the taxes in question upon the property omitted by the decedent, prior to

> the act of 1891, *is not created by this last law but arises under that of 1881.* No such conclusion can be placed upon the statute of 1891 as would authorize a court in holding that the Legislature, by any of its provisions, intended to affect the primary right of the state to recover these taxes, *accrued to it under former law,* for the years mentioned. The tax law of 1891 simply granted to the state as a remedy, or in other words, provided certain means as a procedure to enforce *a right which existed in its favor under a former statute,* namely, that of recovering the taxes to which it was entitled by the act of 1881, and which right the law of 1891 did not abrogate. *It impaired no vested rights of the taxpayer,* and the recovery of the taxes involved in the case at bar was a fair subject for the application of retrospective legislation." (Italics ours.)

The above decisions of the Supreme Court of Indiana are sustained by *Sturges* v. *Carter,* 114 U. S. 511, 518, where this Court held:

> "In substance, this contention is that a taxpayer who has been evading the payment of the taxes due from him by making false returns, can shield himself behind the annual settlement made by the auditor with the treasurer in which his returns were assumed to be true, and that the legislature can pass no act by which the falsity of the returns can for a limited period (in this case four years) be exposed, and the payment of the taxes enforced—in other words, *that the taxpayer has a vested right in the fruits of his false returns. Such a proposition cannot be sustained. Foster* v. *Essex Bank,* 16 Mass. 245.

> "In our opinion, no right of the taxpayer was invaded by the act of 1878. *His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the state,* and the act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. *It gave a new remedy to the state for enforcing a right which it had all the time possessed, namely, the right to the taxes upon property liable to taxation.*" (Italics ours.)

Breed's investments in intangibles were subject to taxation in Indiana during his life. Those taxes were due to Grant County and its subdivisions. The act authorizing the auditor to assess omitted property and the Act of 1927, authorizing treasurers to sue for taxes such as are here involved, gave remedies for enforcing a right which Grant County and its subdivisions all the time possessed, viz., the right to the taxes upon property liable to taxation. As against this claim neither Breed nor his estate had any vested right in the fruits of his failure to return his taxable property.

In the instant case, the proceedings by the auditor after Breed's death were not taken for the purpose of creating, *de novo,* a right to the omitted taxes. They were steps for the enforcement of a statutory remedy for the recovery of *already accrued taxes* to which, in every year of omission during Breed's life, the County and its subdivisions had a vested right because of his residence and ownership. That right could not be divested by Breed's death. Being a personal obligation (already accrued under the statute) it survived. The remedy for its enforcement was recognized by the Act of 1927 under which this suit is brought.

We respectfully submit:

The nature of the tax obligation sued upon is personal rather than *in rem*. Assessment was unnecessary to fix the tax obligation, although necessary to liquidate the amount thereof. The fact that no assessment was made prior to Breed's death, therefore, did not prevent the accrual of the obligation. The obligation accrued on March first of each year against Mr. Breed, and subsists as a claim against his estate.

## V.

**Extraterritorial imposition of tax liability must be distinguished from extraterritorial enforcement of such liability. The latter is constitutionally unobjectionable.**

The Circuit Court of Appeals, in its prevailing opinion, fell into the error which appears in the *Harbeck* and other cases, of confusing two entirely distinct matters, viz: the imposition of liability and the enforcement of liability. The opinion treats the question of whether liability, validly incurred, may be enforced in another jurisdiction, as the equivalent of the question whether liability may be imposed extraterritorially. These are both treated as constitutional questions, although the Constitution does not touch in any way the question of such enforcement.

The prevailing opinion states: "With the appellees and property without the state, and the estate being administered in New York, the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclude one state from acting as a collector of taxes for a sister state and from enforcing its penal and revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state

is, by the Federal Constitution, limited to persons and property within its jurisdiction (Tr., p. 37)." After citing *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, and commenting on *New York Trust Co.* v. *Island Oil & Transport Corp.*, 11 Fed. (2d) 689, and *State of Colorado* v. *Harbeck*, 232 N. Y. 71, the opinion proceeds: "The tax laws of one state cannot be given extraterritorial effect so as to make collections through the agency of the courts of another state. Indiana's political subdivision, Grant County, is limited in the payment of taxes to property found within its boundaries." After citing several cases which were either penalty cases or cases decided in courts of minor jurisdiction the court says (Tr., p. 38): "The appellant's argument that the extraterritorial imposition of a tax is to be distinguished from the extraterritorial collection or enforcement of the tax is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana has no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national district court outside the state to collect such tax."

These quoted portions of the prevailing opinion proceed partly upon the theory that no tax was imposed and no liability had accrued prior to the death of the decedent. Judge Learned Hand's opinion was to the contrary. The petitioner believes that it was demonstrated in Point IV of this brief that the liability accrued and became a personal liability of the decedent during his lifetime and while he was a resident of Grant County,

Indiana. If this be true, those portions of the prevailing opinion which are based on the theory that no tax was imposed until after the death of the decedent are without foundation in law.

The prevailing opinion blends and confuses the two questions of extraterritorial imposition and extraterritorial collection of tax liability. These two questions, however, are absolutely separate and distinct. Extraterritorial imposition of tax liability is prohibited by the Constitution. The Constitution is silent as to the collection of such liability.

The revenue laws of one state have no force in another *ex proprio vigore*. No revenue law of Indiana can create a single right or liability, unless there be some person or property subject to the jurisdiction of Indiana upon which the statute can operate. No revenue law can extraterritorially give rise to obligations. This, however, is not a peculiarity of revenue laws. It is equally true of every law, whether statutory or otherwise. On the other hand, it is elementary that *obligations arising from the laws of a state*, whether statutory or otherwise, are enforcible in other states. Enforcement of the liability outside the state in which it arises is a commonplace. When liability has attached by virtue of a statute, such liability does not evaporate at the border. Otherwise, all citizens would shed all rights at the state border. Extraterritorial enforcement of accrued rights is a matter entirely distinct from the extraterritorial enforcement of statutes, *as such*, by the imposition of obligations outside the jurisdiction. A revenue act is ineffective to impose any obligation upon persons or property not subject to the jurisdiction of the state. But when, as here, the obligation has accrued under the express provisions of the state statute, the enforcement of the obligation outside the territorial limits of the state does not involve

extraterritorial operation of the statute. Courts sit to enforce rights, not laws, and although laws have no efficacy to create rights and liabilities beyond the border, rights and liabilities accrued thereunder in the taxing state may follow persons or property across the border, and the enforcement thereof beyond the state jurisdiction involves no extraterritorial efficacy of the statute creating the right or obligation.

Recovery in a foreign jurisdiction, of a judgment for accrued tax liability, would constitute merely the enforcement of a transitory civil cause of action under the ordinary principles of comity, and would involve no extraterritorial enforcement of the statute. Recovery, in a foreign jurisdiction, of a judgment under which defendant's property could be taken, when, by reason of the absence of the person from the taxing jurisdiction, or for whatever reason, no personal liability had theretofore been imposed by law upon the defendant, in the taxing state, would effect the taking of property, and the consequent enforcement of the revenue act by means of the judgment, and would, therefore, constitute enforcement, by means of such judgment, of the revenue laws of another state *as such* and would give such laws extraterritorial effect, thereby directly contravening the due process clause.

The taxing power is limited to persons and property within the state's jurisdiction. But this means only that the state's power is so limited as to the *imposition* of liability. If liability be imposed within the state's jurisdiction, there arises a transitory civil liability, an obligation to pay the tax, which being no part of the law *as such* is excluded from the operation of the principle which precludes the enforcement of the revenue laws of a sister state *as such*.

The distinction is illustrated in the following cases:

In *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, the action was brought in tort to recover damages for injury resulting in death, the cause of action arising under a Massachusetts statute, the question involved being whether a right of action under that statute might be enforced in the New York courts (p. 102). The court recognized that the courts of no country execute the penal laws of another country, but held that, although the statute had penal features, it was not in substance penal (p. 102, *et seq.*). Judge Cardozo said (p. 106):

> "A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids. That is the generally accepted rule in the United States (*Huntington* v. *Attrill*, 146 U. S. 657, 670; *Stewart* v. *B. & O. R. Co.*, 168 U. S. 445; *N. Pac. R. R. Co.* v. *Babcock*, 154 U. S. 190; *A. T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 67, 68; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478, 479; *Howarth* v. *Lombard*, 175 Mass. 570; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527, 530)."

And at page 110, he said:

> "A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found' (*Slater* v. *Mex. Natl. R. R. Co.*, 194 U. S. 120, 126; *Lauria* v. *Du Pont De Nemours & Co.*, 241 Fed. Rep. 687; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478). 'No law can exist as such except the law of the land; but * * * it is a principle of every civilized law that vested rights shall be protected' (*Beale, Conflict of Laws*, Sec. 51). The plaintiff owns something, and we

help him to get it (*Howarth* v. *Lombard,* 175 Mass. 570; *Walsh* v. *B. & M. R. R.,* 201 Mass. 527; *Walsh* v. *N. Y. & N. E. R. R. Co.,* 160 Mass. 571; *Beale, Conflict of Laws,* Secs. 51, 73). We do this unless some sound reason of public policy makes it unwise for us to lend our aid."

In *Howarth* v. *Lombard,* 175 Mass. 570, 572, 56 N. E. 888, it was said:

> "The fundamental question is whether there is a substantial right originating in one state, and a corresponding liability which follows the person against whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced *ex comitate* in another state unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him."

In *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, two actions against an initial interstate carrier for failure to deliver merchandise were brought in a Texas state court. The Supreme Court said (p. 490):

> 'The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.
>
> "Statutes have no extraterritorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was

some question both as to the duty and power to try civil cases arising solely under the statutes of another state. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and the state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by federal statute. *Robb* v. *Connolly,* 111 U. S. 624, 637."

Revenue acts have no inherent peculiarity, as distinguished from other statutes, which would make the extraterritorial enforcement of obligation arising thereunder the equivalent of extraterritorial operation of the statute itself. Therefore, enforcement of the obligation outside the jurisdiction in which the obligation arises is subject to no constitutional objection.

VI.

**The conception of tax liability entertained by the Federal courts differs from the conception generally entertained by the courts of the States. Under the former conception, at least, no principle of law prevents suit in a jurisdiction extraneous to the taxing jurisdiction.**

The *Harbeck* decision, discussed under Point VII hereof, is based upon a conception of tax liability radically different from the conception of such liability entertained by the federal courts, but which is generally entertained by the courts of the states, to wit: that tax acts impose no obligation that is enforcible except under the express or implied terms of the act providing for the tax; that taxes may not be collected except in accordance with the provisions of the act, and that unless there be some statutory authority in the act no action for collection will lie; that taxes are not debts, and that no interest runs on delinquent taxes unless so expressly provided by the statute.

Under this conception liability for taxes is a most restricted obligation which, it is arguable, it would be improper for the courts of a foreign jurisdiction to enforce. The Indiana conception of tax liability is not so restricted. The Indiana statutes create general obligations which under the decisions of the Indiana courts are debts.

*Mullikin* v. *Reeves,* 71 Ind. 281, 284;
*Funk* v. *State,* 166 Ind. 455, 457;
*Darnall* v. *State,* 174 Ind. 143; (
*Prudential Casualty Co.* v. *State,* 94 Ind. 542.

The courts of a sister state do not necessarily adopt the conception of tax liability held by the courts of the taxing state. But the federal conception of tax liability accords entirely with the Indiana conception and, there-

fore, in the federal courts Indiana taxes are general obligations, whether or not technically entitled "debts."

Although the *Harbeck* case was decided on a point of constitutional law the decision was unquestionably influenced by the restrictive conception of the nature of tax obligation entertained by the court. Even though there be a principle of private international law which would preclude the New York courts from enforcing such restricted obligations as the New York courts hold taxes to be, no such principle would apply in the federal courts.

Obligations arising under the laws of foreign states will be enforced under the principles of comity unless the public policy of the trial jurisdiction is contrary to such enforcement. Such public policy will depend in large measure upon the conception entertained in that jurisdiction of the nature of the cause of action—in this case the nature of the liability for personal property taxes.

Under the statutes of Indiana as construed by the Indiana courts personal property taxes are debts. The courts of the United States hold that, at least where so intended by the statute, taxes are debts and that taxes may be collected by suit when there is a sum due, either certain or readily reduced to a certainty, which is a personal liability. Such is the liability in the instant case. Even assuming that under the stringent conception of tax liability entertained in the *Harbeck* and similar decisions, comity might be refused in the enforcement of tax liability, the fundamentally different conception of tax liability entertained by the federal courts would dictate a contrary policy.

We find the federal rule illustrated in the case of *Billings* v. *United States,* 232 U. S. 261, where the Government sued for a federal excise tax upon foreign-built yachts. This case authoritatively distinguishes the fed-

eral rule from the state rule. The court there said (p. 285):

> "To avoid prolixity we do not review the state cases as to non-liability for interest on default of taxes but content ourselves with stating that we think it is apparent that the conclusion which they sustain, leaving aside minor differences rests upon two fundamental propositions: First, the necessity for an express statute providing for interest except in cases of contract, and second, that even where there is a statute providing for interest on all debts, such statute is not applicable to taxes because they are not debts and therefore must be enforced alone by virtue of express legislative penalties, except where a provision exists giving *eo nomine* interest on taxes. But both of these propositions are in conflict with the settled doctrine established by the decision of this court. Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. *Young* v. *Godbe,* 15 Wall. 562, 565:
>
> " 'It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character.'

"And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice even though no express statute existed for compelling this payment. So also as to the nature and character of the obligation to pay taxes. As long ago as *Meredith* v. *United States,* 13 Peters 486, it was decided, the court speaking by Mr. Justice STORY (p. 493):

" 'It appears to us clear upon principle, as well upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer * * *'

"Again in *United States* v. *Chamberlin,* 219 U. S. 250, the nature and character of an obligation to pay a stamp duty was considered, and the right to collect it by action of debt was passed upon and it was held that the obligation to pay was a debt and that it could be enforced by suit in the absence of an exclusive remedy created by the statute by which the obligation was imposed. In the course of the opinion, various decisions of this court recognizing the right of the United States to enforce internal revenue duties by suit were referred to and the statute to the same end was cited and its application to the case in hand was pointed out upon grounds which in reason may well be said to cause the statute to be applicable to the case here before us. In addition, in repeated adjudication in this court it has been settled that in a suit to recover taxes which have been illegally assessed interest would be allowed against the official although the real responsibility was on the Government. The concluded

doctrine on this subject was thus stated in a recent case after referring to the exemption of the United States from liability for interest (*National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496):

> "'On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the Treasury. *Erskin* v. *Van Arsdale*, 15 Wall. 75; *Redfield* v. *Bartels*, 139 U. S. 694.'
>
> *"The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory authority, in the other the right to sue for taxes as for a debt in every case where not prohibited by statute.*
>
> "From this review it results that the doctrine as to non-liabilty to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules." (*Italics ours.*)

The tax under consideration in the *Billings* case was a federal tax, but its reasoning applies equally to suits arising out of a liability for state taxes. The nature of the

obligation is determined primarily by the enacting state. A tax intended not to constitute an obligation collectible by action, but to be collected exclusively by the statutory remedy, could not be transformed into a different obligation. The Indiana courts, however, have held that taxes constitute debts collectible by suit, and the Indiana statutes have in terms so provided. The Indiana decisions are entirely in harmony with the federal decisions.

In *United States* v. *Chamberlin*, 219 U. S. 250, an action was brought to recover the amount of a documentary stamp tax, payable under the War Revenue Act of 1898. The only question was whether or not the tax could be collected by action. The court lays down this preliminary proposition (p. 258):

> "If the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action may be regarded as well brought."

It comments on the common law rule as follows:

> "At common law, customs duties were recoverable by the Crown by an information in debt or exchequer information in the nature of a bill in equity for discovery and account. These informations rested upon the general principle 'that in the given case the common law or the statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the importation, and that, therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown.'"

The court refers to various preceding cases under other federal tax acts and reaches the following conclusion (p. 262):

> "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used. But whether the Government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive. Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty."

The court found that the act in question imposed a personal obligation (p. 263) and contained nothing to negative its collection by action (pp. 263 and 269). The right of action was therefore sustained.

Taxes of all kinds are held to be debts that may be made the subject of a suit by the Government, irrespective of whether or not other remedies may exist for their collection.

*Billings* v. *United States*, 232 U. S. 261, 287;
*United States* v. *Chamberlin*, 219 U. S. 250, 262;
*Dollar Savings Bank* v. *United States*, 19 Wall. 227, 237, *et seq.*;
*United States* v. *Erie Ry.*, 106 U. S. 327;
*United States* v. *Nashville Ry.*, 249 Fed. 678, 683-4;
*United States* v. *Grand Rapids Ry. Co.*, 239 Fed. 153;
*United States v. Minn. Threshing Machine Co.*, 229 Fed. 1019, 1020;
*United States* v. *Mexican R. Co.*, 154 Fed. 519;
*United States* v. *National Fibre Board Co.*, 133 Fed. 597;
*United States* v. *Cobb*, 11 Fed. 76, 79;

*United States* v. *Hathaway*, 3 Mason 324, 325, 326, Fed. Cases No. 15983;
*United States* v. *Phelps*, 17 Blatch. 312, 315;
*United States* v. *Pacific R. R.*, 4 Dillon 66, 67-69.

In the case at bar, there was always a duty imposed upon the decedent by the laws of Indiana (the state of his residence) to report for taxation his personal property in that state for the purpose of enabling the taxing officials to value it for taxation purposes, and to pay the taxes levied thereon. These taxes became due and payable on a day certain in each year. The sums due were readily reduced to certainty, had he listed his property. These sums have since been rendered absolutely certain by the acts of the tax officers of Grant County in duly assessing his omitted property and in extending taxes thereon, upon notice to the defendants and an opportunity for them to be heard. All of the circumstances are here present which evoke the doctrine set forth in the *Chamberlin* case.

There can be no distinction in principle between a tax for which the Federal Government may sue as for an indebtedness, and a tax sought to be recovered by a subdivision of a state. The authority of the court is the same in each. Hence the foregoing federal decisions are applicable to the case at bar.

The federal decisions, since they are in entire accord with the Indiana conception of such obligation, establish that for the purpose of suit the obligation for Indiana personal property taxes is a debt. Certainly there is no public policy hostile to the collection of debts in a jurisdiction other than that in which they arise. Even waiving the definition, the federal cases clearly indicate that there can be no public policy hostile to the collection, in the federal courts, of personal obligations of such a nature as those courts consider to be the nature of tax obligations.

Under the federal conception of the nature of tax liability, therefore, the United States courts should enforce such liability arising under the statutes of a state, even considerng the United States courts as courts of a foreign jurisdiction. But the laws of the several states are not foreign to the United States courts. It is elementary that the United States District Court for the Southern District of New York is not a court charged with the administration of the laws of New York alone. It also enforces the laws of the State of Indiana applicable to cases properly before it. The jurisprudence of Indiana is not foreign to the court. The situation differs from that involved in a suit by a citizen of Great Britain, or any other foreign power, who bases his right to sue in a federal court upon a foreign statute. Federal courts do not sit to administer the laws of foreign countries. But they *do* sit to administer state as well as United States statutes. For that reason the District Court takes judicial notice of the laws of Indiana and should enforce them, even where a New York State court might decline to do so.

In the leading case of *Owings* v. *Hull,* 9 Pet. 607, the federal court, sitting in Maryland, was held required to recognize and enforce the laws of Louisiana. The Supreme Court held (p. 625):

> "We are of opinion, that the circuit court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And this

court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. *That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established;* but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts." (Our italics.)

To the same effect are:

*Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 751;
*Mills* v. *Green,* 159 U. S. 651, 657;
*Dennick* v. *Central R. R. Co.,* 103 U. S. 11, 17;
*Gormely* v. *Bunyan,* 138 U. S. 623, 635.

The laws of Indiana, under which this tax liability arises and by which the county treasurer is authorized to bring suit, are therefore not foreign to this Court and to the court below. The reasons advanced for refusal of *state* courts to recognize and give effect to the laws of a sister state have no application. In the latter courts, the laws of other jurisdictions are mere *facts,* not laws. In the federal courts they are *laws,* with all the incidents of legislative enactment.

Therefore, since obligations accrued under revenue laws are transitory actions of a civil nature such as, in the absence of a public policy to the contrary, are enforced in the courts of foreign jurisdictions, and since the reasons for the exception to the rule for enforcement applicable to criminal and penal statutes are wholly inapplicable to revenue acts, and since there is no public policy of the

United States under which the comity of the federal court should be refused, the district court should have assumed jurisdiction of the present cause of action.

## VII.

**The cases cited in the opinion of the Circuit Court of Appeals are all distinguishable or are mere decisions of courts of minor jurisdictions.**

*State of Iowa* v. *Slimmer,* 248 U. S. 115, involved no question of taxation. The State of Iowa asked leave to file in the Supreme Court an original bill of complaint against the State of Minnesota and certain individuals to restrain the prosecution in Minnesota of probate proceedings upon the estate of a decedent who was alleged to have been a resident of Iowa. The motion was made with a view to collecting ultimately certain taxes which the State of Iowa alleged it was entitled to have assessed and levied against the property of decedent, but the tax liability was not in issue and the only question involved was whether the State of Iowa could restrain the prosecution of probate proceedings in Minnesota.

*Ashley* v. *Ryan,* 153 U. S. 436, held only that a charge, under the laws of the State of Ohio, upon an interstate consolidated railroad corporation, of a percentage of its entire authorized capital stock, as a fee for filing its Articles of Consolidation in the office of the Secretary of State, is not a tax on interstate commerce and that its enforcement involves no attempt on the part of the state to extend its taxing power beyond the territorial limits. The court said at p. 440:

> "Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be

> viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction."

The above, which was stated only *arguendo* and not applied in the Ryan case, is unquestionable in legal principle, but as it concerns the imposition and not the collection of taxes has no bearing on the present case.

*Matter of Anita Bliss,* 121 Misc. (N. Y.) 773, is a decision of the Surrogate's Court of New York County misconstruing, if the petitioner's theory as to that decision is correct, the decision in the *Harbeck* case.

*Walker* v. *Treasurer,* 221 Mass. 600, was an action brought by the Administrator with the will annexed of a Massachusetts estate to determine the liability of the estate to the Commonwealth for a succession tax in respect of certain property held in trust by a Maryland corporation, and, therefore, outside the jurisdiction. It involved the question of whether a tax could be levied upon property outside the jurisdiction and not the question of whether taxes could be collected by suit outside the jurisdiction.

*People* v. *Kellogg,* 268 Ill. 489, also involved only the question as to whether taxes could be imposed upon property not subject to the jurisdiction. This case held that real estate in Ohio was not subject to an Illinois inheritance tax as it did not descend by virtue of the laws of Illinois.

*State of Colorado* v. *Harbeck,* 232 N. Y. 71, is the case upon which the respondent has insisted most strongly throughout this litigation. The indulgence of the Court

is therefore asked for the following lengthy but necessary discussion of that case.

*The Harbeck case was decided on a point of constitutional law.*

The Court of Appeals stated the question for decision as follows:

> "The question is whether the inheritance tax of Colorado may, *consistently with the due process clause of the United States Constitution,* be collected extraterritorially, by suit against the beneficiaries." (Italics ours.)

The facts are as follows: The State of Colorado sought to recover a Colorado inheritance tax against defendants, who were distributees of a decedent's estate, the will having been probated in New York. The executrix had been discharged and the estate settled two years prior to the commencement of the action. The inheritance tax had, of course, never been an obligation of the decedent during his lifetime but became operative, if at all, only at his death. The tax was assessed with reference to the transfer of stocks, bonds, etc., which had at all times been deposited and held in New York. No proceedings were taken for the assessment of the tax until after the executrix had accounted and the estate been distributed in New York. The Colorado statute provided that the tax should be a lien upon the property transferred until paid and that all legatees and executors should be liable for such taxes until the same had been paid. Neither the property nor the defendants, however, were within the State of Colorado or subject to the jurisdiction of that state.

The trial court based its decision in favor of the defendants upon the fact that the inheritance tax sought

to be recovered was not a debt and consequently was not founded upon a contract express or implied upon which a suit might be predicated, and upon the further ground that the plaintiff had not alleged and proved that it had a right under the Colorado law to institute the suit (106 Misc. 319).

The Appellate Division of the Supreme Court unanimously reversed the court below and held that the action could be maintained (189 App. Div. 865). *Inter alia,* it was there said (p. 875):

> "There is nothing to prevent a state, a political corporation, from seeking in the courts the relief or redress that any other corporation may demand (*Delafield* v. *State of Illinois,* 2 Hill 159). • • •
>
> "The remedy sought by the plaintiff is not limited to its courts and adequate enforcement can be had in ours (*Howarth* v. *Angle,* 162 N. Y. 179; *Shipman* v. *Treadwell,* 200 *id.* 472).
>
> "Public policy does not prohibit the assumption of jurisdiction by this court and the principle of comity demands it. (*Loucks* v. *Standard Oil Company,* 224 N. Y. 99.) The Inheritance Tax Law of Colorado has precisely the same design as a similar law in this state, and may indeed be said to be identical in its general provisions and scope. It was apparently to avoid the full force of the provisions of our own law that the defendants placed the decedent in the position of a non-resident of this state. As was said in the Loucks case: 'A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, follows the person and may be enforced wherever the person may be found. • • •' 'No law can exist as such except the law of the land;

> but * * * it is a principle of every civilized law that vested rights shall be protected.' * * * The plaintiff owns something, and we help him to get it. * * * We do this unless some sound reason of public policy makes it unwise for us to lend our aid.' "

This unanimous reversal of the trial court was in accord with the expressed trend of the New York Court of Appeals to extend the rule of comity between the states, as illustrated in the case of *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99. Judge Cardozo there said (p. 113):

> "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union (*Walsh* v. *N. Y. & N. E. R. R. Co.*, 160 Mass. 571, 573; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527, 533; Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale Law Journal 656). There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another. The evidences of this tendency are many."

This principle was stated in an earlier case (*Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, 194) as follows:

> "The reasons for extending the rule of comity between the States is constantly increasing. It should when practicable be extended, but not curtailed."

In spite of these declarations, the Court of Appeals reversed the Appellate Division, upon the ground that

enforcement of the alleged liability by the action at bar would contravene the due process clause of the constitution.

The Circuit Court of Appeals cites the *Harbeck* case for the general proposition of non-enforceability of tax obligations accruing under the laws of another state. This, we submit, is an entirely erroneous and unjustifiable interpretation and application of the decision. The entire *Harbeck* opinion is predicated upon the premise that by reason of the absence of the persons and property from Colorado, no tax liability had accrued, and from this premise the conclusion inevitably followed that to allow a recovery would be to enforce, extraterritorially, the tax act as such. The court held that the proper steps to fix liability had not been taken, and that liability could not be fixed in Colorado because of lack of jurisdiction over the persons and property involved. To allow a recovery under such circumstances would be tantamount to an extraterritorial *imposition* of the tax, a result obviously prohibited by the due process clause. A judgment based upon liability validly imposed within the taxing state would involve entirely different legal consequences. Such a judgment would not constitute an extraterritorial imposition of liability, nor the extraterritorial enforcement of the tax act as such, but would be merely the enforcement of a transitory obligation which follows the person. Such enforcement of obligation outside the originating state, which is most common, is constitutionally unobjectionable.

Some of the language of this decision appears, apart from its context, to advance the general proposition of non-enforceability of tax liability outside the taxing state, even though liability had been imposed within that state. Analyzed with the context, it is clear that such language is directed only to the question of extraterritorial enforce-

ment of a tax act as such, and not to the enforcement of liability accrued thereunder. This conclusion is greatly strengthened by the fact that no single authority cited in the *Harbeck* decision deals with extraterritorial collection, or goes further than to negate the right to *impose* tax liability extraterritorially.

Therefore, as the valid accrual of tax liability in the case at bar is indubitable, the *Harbeck* case is not in point, nor are the principles therein enunciated applicable. Although onerous, it is necessary, for a proper understanding of the *Harbeck* decision to examine its entire line of reasoning. The several points discussed are logically related; each point is considered in the light of the fact stated in the opinion (p. 80) that the property was not present in Colorado and that the defendants were non-residents, and is directed to the constitutional question stated.

The first point made was that, as the statute made no provision for collection by action, no action would lie, even though the statutory method of collection were unavailable; that no substitute for the statutory method of collecting taxes, as such method is expressed or fairly implied, may be invoked *either in the State of Colorado or elsewhere* (p. 81). It may be noted that Judge Crane concurred upon the sole ground that he could find no authority in the Colorado tax law for the action (p. 85). This point does not concern extraterritorial collection except incidentally, the decision being that collection by suit was unavailable even in Colorado. Nor has it any application to the case at bar, since the present action is explicitly directed and authorized by statute. It may be noted, however, that the Indiana decisions uphold the right of action without explicit statutory authorization, in which the federal decisions, contrary to the New York decisions, concur.

The court then held that the suit could not be maintained as an action upon an implied contract, arising from the acceptance of a legacy under the will of a resident of Colorado (p. 81). The argument of the court, summarized, was that taxes are non-contractual in nature, enforcement of revenue laws resting not on consent, but on force and authority; and that "No personal liability *based upon the receipt of a legacy* arises except under the provisions of the Colorado statute (§1) that the person to whom the property is transferred shall be personally liable for the tax until its payment *and that liability is purely local and statutory.*" (Italics ours.) The discussion of this point did not concern enforcement, but the question was whether the receipt by legatees who were beyond and not subject to the jurisdiction of Colorado, of a legacy consisting of property which was in the contemplation of the court outside the jurisdiction of Colorado, created a quasi-contractual obligation. The conclusion was reached that the acceptance by persons outside the State of Colorado of property outside the State of Colorado created no liability under a statute which could impose liability only locally within the State of Colorado. (It may be noted that the federal rule does not accord with the theory stated as to the nature of tax liability. See Point VI. And that the court was in error in holding that the property was outside the jurisdiction, under the decision in *Blodgett* v. *Silberman*, 277 U. S. 1, *infra*, p. 72. In the case at bar there is no question of quasi-contractual obligation. Mr. Breed's tax liability arose not from any acts performed by him, his executors or legatees, either in the State of Indiana or elsewhere, but by the direct operation of the Indiana statute upon a resident of that state in respect to property within the jurisdiction.

The court then held that the above-stated implied promise theory was fallacious, for the further reason that Colorado had acquired no control either of the property of the estate or of its owners, the executrix having paid the legacies by virtue of the authority vested in her on the probate of the will by the state of New York without invoking any privilege or sanction conferred upon her by the State of Colorado (p. 82). This point, which also concerns taxability and not collection, has no bearing on the instant case since Indiana had jurisdiction both of Mr. Breed and of his property.

The court then held (p. 83):

> "Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction, so that no personal liability or enforceable duty may be established as against them and where the property involved is without the taxing state so that no *res* exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue."

Under the circumstances stated, *i. e.*, where by reason of the absence of both person and property from the state neither can be taxed, the state is powerless to collect, either at home or abroad. The helplessness in the matter of remedy results from the inability to tax—the inability to impose personal obligation upon persons absent from the jurisdiction, or to impose a lien upon property

absent therefrom. This point goes to the original establishment of existing liability, and is inapplicable to a case like the present where liability is imposed upon a resident in respect to property within the state. It should also be noted that the authorities cited at this point deal solely with the question of the imposition of liability and not with the question of collection.

The court then held that the rule *mobilia sequuntur personam* did not apply and that the tangible *res* was at all times in New York and not Colorado, and that, therefore, the State of Colorado had no enforceable lien thereon by virtue of the taxing order (p. 83). The application of the rule *mobilia sequuntur personam* is of the utmost importance in the present litigation. If the rule applies in case of an inheritance tax, it certainly applies in the case of a personal property tax. The refusal of the Court of Appeals to apply the rule in the case of an inheritance tax was erroneous. This Court has since, in the case of *Blodgett* v. *Silberman* (*infra*, p. 72), upheld a Connecticut inheritance tax act upon a state of facts identical in all material particulars to those presented in the *Harbeck* case, holding that for the purpose of liability under an inheritance tax act the rule should be applied.

The next point made by the court is that the steps provided by the Colorado statute for the fixing of personal liability had not been carried out (p. 84). In the instant case, the Indiana statutes have been complied with in all particulars.

The court then makes its final point. At page 85 it is said:

> "But it is urged that the right of the State of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective, is upheld by its local laws (*Pinnacle G. M. Co.* v.

*People,* 58 Col. 86); that the Colorado statute provides that the attorney-general may collect the tax in 'any other manner as may be provided in this act or *by law'* (Act of 1916, Sec. 13), *i. e.,* by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction. (*Wisconsin* v. *Pellican Ins. Co.,* 127 U. S. 265; *Marshall* v. *Sherman,* 148 N. Y. *supra,* pp. 24-26; *Louckes* v. *Standard Oil Co. supra,* p. 102; *Walker* v. *Treasurer, etc.,* 221 Mass. 600; *City of New York* v. *McLean, supra.*)"

It is from this portion of the *Harbeck* decision, doubtless, that the Circuit Court of Appeals drew the conclusion that that case upheld the general proposition of nonenforcibility of tax liability outside the taxing state. But throughout the *Harbeck* opinion, the court has discussed the several points on the basis of the invalidity of the alleged liability, or failure to impose liability either on the persons or on the property. Certainly the court does not at this point, without warning and without calling attention thereto, change the entire basis of its discussion and its entire line of reasoning. This point is

predicated on the same facts as the previous points considered.

The principle is stated that one state is precluded from acting as collector of taxes for a sister state and from enforcing the penal and revenue laws *as such*. Although unsupported by citation of authority, we do not question this principle, if properly applied and limited, the limitation being contained in the words *"as such."* These words limit the application of the principle to the enforcement of these laws *as laws* and exclude from such application the enforcement of consequences of the laws, namely, the duty to pay what the law of the taxing state had already imposed on persons and property subject to the jurisdiction.

Petitioner submits that it is established under Point V hereof, that the extraterritorial imposition of obligation is a matter entirely distinct from the extraterritorial enforcement of such obligation and that the latter is subject to no constitutional objection.

A correct interpretation of the *Harbeck* decision therefore limits its application to cases where no tax liability had been otherwise validly imposed. If that decision, however, can be said to deny as a general proposition, extraterritorial enforcement of tax liability, even where the liability has been validly imposed, we believe that it is unsound and entirely unsupported by authority. It is above demonstrated that there is no constitutional objection to the maintenance of jurisdiction. The authorities cited deal only with the jurisdiction to impose tax liability on persons or property, and not with the collectability of liability when imposed, and do not in any way support, or even consider, the non-collectability of such liability. The *Harbeck* decision refused jurisdiction on strictly constitutional grounds. The question of comity did not come up for consideration, and there was

no pronouncement that comity would be denied on grounds of public policy. If the constitutional objection fails, the court below should have taken jurisdiction of the instant case, in the absence of a rule of public policy to the contrary. No such rule exists (Point VI, *supra*).

*Blodgett* v. *Silberman*, 277 U. S. 1, overrules the theory upon which the *Harbeck* case declared the inheritance tax invalid and thereby vitiates the conclusions reached in the *Harbeck* case. Since the *Harbeck* decision this Court has, in its decision in *Blodgett* v. *Silberman*, enunciated a theory as to he validity of inheritance taxation directly contrary to the holding in the *Harbeck* decision, thereby not only shattering confidence in the *Harbeck* case as an authority, but also entirely invalidating the conclusions reached.

The *Blodgett* case, which is identical in all its material facts with the *Harbeck* case except that there the action was against foreign executors instead of against legatees, and was brought in the taxing state, establishes the rule *mobilia sequuntur personam* as applicable to inheritance taxation. The decision in the *Harbeck* case denies any *jurisdictional right* on the part of the domicile state to impose a succession tax with respect to stocks and bonds physically located in another state and repudiates the doctrine of *"mobilia sequuntur personam,"* sawing:

> *"'Mobilia sequuntur personam'* is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located."

That this is the ground of the decision is clear from the following:

> "This state taxes the succession of personal property of non-residents according to the actual *situs* of the thing (*Matter of Romaine*, 127 N. Y. 80, 89), and our courts may not say that the assets of the estate are at the same time actually within and without the State of New York. *The tangible res was, therefore, at all times in New York, and not in Colorado.*" (Page 84.) (Italics ours.)

Again, the court held:

> "Colorado had acquired no control either *of the property of the Harbeck estate* or of its owners." (Italics ours.)

And further:

> "Where the property involved is *without the taxing state* so that *no res exists upon which the taxing state may impose a lien*, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue." (Italics ours.)

If the court in the *Harbeck* case had recognized this principle, there is nothing in the opinion to indicate that access to its courts would have been denied to collect a valid tax.

The following cases are commented on for the reason that they are cited in the opinion of the District Court below, and in the *Harbeck* opinion:

*Pennoyer* v. *Neff*, 95 U. S. 714, does not involve the application of the law of a foreign state. It arose in the Circuit Court of the United States for the District

of Oregon. The plaintiff Neff sued the defendant Pennoyer for the recovery of a tract of land situated in Multnomah County, Oregon, Neff claiming title under a United States patent and Pennoyer claiming title by virtue of a sheriff's sale under execution, sued out upon a judgment against Neff rendered by an Oregon state court. Neff was a non-resident of Oregon and had been served only by publication of the summons. It was held that substituted service by publication of process, instituting actions brought against non-residents, is effectual only where property within the state is brought under the control of the court and subjected to the jurisdiction by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein. The opinion states that since the adoption of the Fourteenth Amendment to the Federal Constitution the validity of the judgments of state courts may be directly questioned and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court had no jurisdiction do not constitute due process of law (p. 733). Except as to the general principle of the inability of a state court to impose liability upon persons outside and not subject to the state jurisdiction, the case is irrelevant to any of the issues in the present litigation.

*Parker* v. *Moore,* 115 Fed. 799, held that the United States courts would follow the rules laid down by the highest court of a state in determining whether the *lex loci contractus* or the *lex fori* should govern, as to the interpretation of the contract and the morality of the claim, in the case of a claim under a contract which was alleged to be a gambling contract but which was enforce-

able under the laws of the State of New York, the state in which it was made and was to be performed.

*Maxwell* v. *Bugbee,* 250 U. S. 525 upholds the constitutionality of a New Jersey inheritance tax. The court conceded that consistently with the Federal Constitution a state may not tax property beyond its territorial purisdiction, but held that the adoption, as a measure of tax, of the proportion which specified local property bears to the entire estate of decedent did not make the tax one upon property without the state (p. 539). It is only this concession that has any bearing on the *Harbeck* case. *Maxwell* v. *Bugbee* does not deal with or consider the question of extraterritorial collection.

*Dewey* v. *Des Moines,* 173 U. S. 193, holds that no personal liability can be imposed by assessment for local improvements against a non-resident owner of real estate who had received no notice of assessment.

*City of New York* v. *McLean,* 170 N. Y. 374, holds that the legislature had no power to impose upon a non-resident a personal liability for the payment of a tax assessed upon shares of national bank stock. The court distinguishes between the jurisdiction of the court over the person of the defendant in the action brought to enforce the alleged personal liability and the question whether any personal liability arose by imposition of the tax (p. 383).

*Matter of Maltbie* v. *Lobstiz Mills Co.,* 223 N. Y. 227, holds that the tax assessed upon the capital of a New Jersey corporation invested in its business in the City of New York imposed upon a foreign corporation no personal liability which could be made the basis of supplementary proceedings when the tax was returned uncollected.

*Marshall* v. *Sherman,* 148 N. Y. 9, was a stockholder's liability action. Merely as illustrative of laws having no

effect in New York, the court said (p. 25), without citation of authority:

> "It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another."

## CONCLUSION.

**The petition for writ of certiorari should be granted.**

Richard Edwards Breed resided for a number of years in Grant County, Indiana. He was, during all that time, the owner of a large amount of intangible personal property subject to taxation. In violation of the laws of the State of Indiana, Breed made no return of his property for taxation. In consequence he paid no taxes on such property either in the State of Indiana or elsewhere. Nevertheless, under the Indiana statutes, an obligation for personal property taxes accrued against Breed in each year as a personal obligation. The amount of such taxes has been fixed by assessment as provided by the Indiana statutes, but such assessment was not a condition precedent to the accrual of the tax obligation. These taxes have never been paid. Petitioner is specifically authorized by a statute of Indiana to maintain the present action.

The money involved, amounting to almost a million dollars, is of great importance to Grant County and to the municipal subdivisions thereof. It is also of the utmost importance to states and other municipal corporations to be able to collect their revenues and it would be seriously detrimental to the vital interests of the states and other municipal corporations if citizens could escape payment of taxes by the mere expedient of removal from the state, even though they might be fraudulently delinquent in their tax obligations. If municipal corporations are limited in their effort to enforce tax obligations to such efforts as they may make within the state borders, the power to collect revenues essential to the existence and proper functioning of the states and their subdivisions will be seriously crippled. They are so limited

unless suit may be maintained beyond the territorial limits of the taxing state.

It is of great importance to the various municipal corporations to know their powers in this matter. Unless it be authoritatively determined that suit will lie outside the territorial limits of the taxing state the various municipal corporations will hesitate to institute suits since, regardless of the final outcome, expense of litigation would be involved. Much revenue therefore properly due to the state and subdivisions thereof would be lost to them.

The question has never been determined by this court or by the inferior federal courts. Authority is meager as to whether suit will lie in the several state courts to enforce tax obligations arising under the laws of other states.

The Circuit Court of Appeals has held that the District Court for the Southern District of New York has no jurisdiction to entertain the present action on the ground that revenue laws, as well as criminal and penal laws, are without force beyond the enacting state. The prevailing opinion makes no distinction between revenue laws and criminal and penal statutes and bases its opinion upon citations of decisions under the latter. Judge Learned Hand in his concurring opinion recognizes the distinction but holds the revenue laws fall within the same reasoning as criminal and penal statutes. But revenue laws are utterly different from criminal and penal statutes and do not fall within the same reasoning. A suit for the recovery of tax obligations which have accrued as personal obligations of a resident of a state during the time of his residence are mere suits for money judgments and do not in any way concern provisions for the public order of a state and cannot violate domestic public policy. Actions on such obligations are transitory actions of a civil nature such as, in the absence of a public policy to the contrary,

may be enforced wherever the person liable is found. The statutes under which they arose are ordinary personal property tax statutes. The view taken by the federal courts as to the personal nature of tax liability is entirely in harmony with the view taken in the statutes and by the courts of Indiana. There can be no public policy hostile to the jurisdiction. Since the reasons on which is founded the exception that criminal and penal laws will not be enforced in another state do not apply to civil obligations under revenue acts, the exception should not be extended to revenue acts. The District Court should have assumed jurisdiction of the cause of action.

The writ of certiorari should, therefore, be granted, and the decision of the Circuit Court of Appeals reversed.

RUSSELL H. ROBBINS,
*Counsel for Petitioner.*

HENRY M. DOWLING,
*Of Counsel.*

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CHARLES ELMORE
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# Supreme Court of the United States

OCTOBER TERM, 1929.

## No. 79

HARRY C. MOORE, as Treasurer of Grant County, Indiana, - - - - - - Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased, - - Respondents.

## *BRIEF FOR PETITIONER*

On Writ of Certiorari to The United States Circuit Court of Appeals for the Second Circuit.


RUSSELL H. ROBBINS,
Counsel for Petitioner.

HENRY M. DOWLING,
Of Counsel.


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# Supreme Court of the United States

OCTOBER TERM, 1929.

## No. 79

---

HARRY C. MOORE, as Treasurer of Grant County, Indiana. - - - - *Petitioner,*

*vs.*

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased, - *Respondents.*

---

## *BRIEF FOR PETITIONER*

On Writ of Certiorari to The United States Circuit Court of Appeals for the Second Circuit.

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OFFICIAL REPORTS OF DECISIONS IN COURTS BELOW.

HARRY C. MOORE, as Treasurer of Grant County, Indiana, v. SIDNEY Z. MITCHELL, et al. (District Court) - - - 28 Fed. (2d) 997

HARRY C. MOORE, as Treasurer of Grant County, Indiana, v. SIDNEY Z. MITCHELL et al. (Circuit Court of Appeals) - 30 Fed. (2d) 600

## STATEMENT.

During each of the years from 1888 to 1926, both inclusive, Richard Edwards Breed was a citizen, resident and inhabitant of Grant County, Indiana. (Tr., fol. 6.) Breed died testate in 1926. Administration was had on his estate in the State of New York and defendants are engaged in administering said estate as executors thereof. No distribution of the estate has yet been made. (Tr., fols. 6, 7.)

During Breed's lifetime and at the time of his death, he was the owner of large amounts of intangible personal property consisting particularly of large amounts of stocks of various business corporations foreign to Indiana, all of which property was taxable to him as the owner thereof in Grant County, Indiana. Under the statutes of Indiana, it was Breed's duty to return all his personal property for taxation on March first of each year (Tr. fols. 7, 8.) Breed made no such returns but on the contrary failed to disclose and concealed his taxable property (Tr. fol. 10). Under the Indiana statutes a personal liability accrued annually against him on March first of each year, although it remained unliquidated until after his death. Neither Breed nor the present respondents have paid any taxes on the property in question (Tr., fol. 11).

Prior to Breed's death, it was unknown to the taxing officials of Grant County that he was the owner of intangible personal property liable to taxation (Tr., fol. 11). After his death, the Auditor of Grant County received information that large amounts of intangible personalty owned by Breed had been omitted in the assessment of each of the years 1903 to 1926, both inclusive, and after a hearing, fixed and assessed the fair and proper taxable value of said omitted property for each of said years and

upon such taxable values assessed taxes for the said years for county, city, civil, township and school township purposes in said Grant County and its political subdivisions, and exclusive of all taxes due the State of Indiana, aggregating $982,516.22 (Tr., fols. 12-15). None of these taxes have been paid (Tr., fol. 20).

Respondents were notified of said auditor's hearing (Tr. fol. 13); they were also notified of his official assessment, as required by the Indiana statute (Tr. fols. 17, 18). They have not, however, taken advantage of the right of appeal given by that statute, nor have they taken any steps to question the assessment (Tr. fol. 18).

The present action was brought in the United States District Court for the Southern District of New York to recover the amount of the said taxes from the said executors.

The petitioner, as Treasurer of Grant County, Indiana, is by statute specifically authorized to maintain the present action (Tr., fols. 18-20).

This case was heard in the District Court upon the complaint and notice of motion for judgment (Tr. fols. 1, 2).

The motion was granted and the action dismissed upon the ground of lack of jurisdiction.

Upon appeal to the United States Circuit Court of Appeals for the Second Circuit, this final disposition of the action was affirmed.

Thereafter certiorari was granted by this court.

## ARGUMENT.

### Point I.

### The Underlying Question.

The underlying question is whether a court of the United States will entertain jurisdiction to enforce liability for taxes accrued to a municipal corporation extraneous to the territorial jurisdiction of such court. The particular form in which this question is presented is whether a federal court will so entertain jurisdiction where the taxes involved are personal property taxes, accrued to a municipal corporation from a resident thereof during the time of such residence and constituting a personal liability of such resident.

### Point II.

**Transitory causes of action of a civil nature are enforcible in the courts of another jurisdiction, unless under the public policy of such jurisdiction there is a sufficient reason to refuse such enforcement.**

The courts of one jurisdiction will not enforce the criminal or penal laws of another jurisdiction. Causes of action arising under such laws are, however, inherently neither transitory nor civil.

The general rule of enforcibility of transitory, civil causes of action is so thoroughly established that no endeavor will be made in this brief to support it, but the argument of the brief will be directed to the point that causes of action arising under revenue laws should constitute no exception.

## Point III.

**The exception, that criminal and penal liabilities will not be enforced in another jurisdiction, should not be extended to include civil liabilities arising under revenue laws.**

As the reasons asserted for so extending the exception are thoroughly discussed in the two opinions in the Circuit Court of Appeals (Tr., fols. 35-46) these opinions will first be examined.

### (a)

### The Prevailing Opinion.

The prevailing opinion held (Tr., fol. 37):

> "With the appellees and the property without the state, and the estate being administered in New York, the effort to collect a tax, for a political subdivision of Indiana, is repugnant to the settled principles of private international law, which preclude one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution (Amendment 14), limited to persons and property within its jurisdiction."

And further (Tr., fol. 38):

> "The tax laws of one state cannot be given extraterritorial effect, so as to make collections through the agency of the courts of another state. Indiana's political subdivision, Grant County, is limited in the payment of taxes of property found within its boundaries."

The principal criticism of the prevailing opinion is that it advances no reason for extending the exception to causes of action arising under revenue laws, but reaches its conclusion by the indiscriminate application of decisions in penalty cases to the instant case, making no distinction between penal cases and revenue cases.

The prevailing opinion also cites as applicable, cases which do not deal with extraterritorial *collection of taxes already accrued,* but which hold only that state statutes do not run extraterritorially so as to *impose,* outside the state border, *original liability.*

The cases cited in the prevailing opinion are discussed under Point VIII hereof.

There is an undoubted principle of private international law which precludes one state from enforcing the penal or revenue laws of another state *as such.* This means, merely, that one state cannot impose original liability under the laws of another state. But exhaustive research by counsel for the petitioner has failed to discover any case in which either this court or the lower federal courts have held that obligations arising under the revenue laws of any state may not be collected in a federal court, or any case in which the appellate court of a state has held that, constitutional and statutory requirements being fulfilled, obligations arising under the revenue laws of one state may not be collected in the courts of a sister state. Decisions in the state courts on this question are at least meager and the question is unsettled in at least almost all of the states. In any case each sovereignty determines the jurisdiction of its own courts and federal courts are not bound by the policy of the several states nor the decisions of the state courts, such decisions being of force in the federal courts only insofar as their reasoning may be persuasive. Moreover the relationship existing between the nation and the

several states thereof is so radically different from the relationship existing between the several states of the nation that reasons which might actuate a state in denying the use of its courts to another state, or to the municipal subdivisions thereof, would be wholly absent when relief was sought in the courts of the nation.

The prevailing opinion is based in part upon the fact that the property was not shown to have been physically in Indiana at any time. The property consisted of shares of stock belonging to a resident of the State of Indiana at the time the liability accrued. It had a taxable situs in Indiana.

*Blodgett* v. *Silberman*, 277 U. S. 1.

The prevailing opinion also makes the point that the tax was not assessed until after Breed's death. It is stated (Tr., fol. 39):

> "The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed."

The tax liability, here sought to be enforced, accrued during the several years of Breed's residence in Indiana, and not upon assessment. This is discussed under Point V hereof.

It is irrelevant whether or not the property was physically present in Indiana at any time or whether the

respondents were ever in Indiana or whether the tax was assessed before or after the death of Breed. The important facts are that Breed during the various years in which tax liability accrued was a resident of Indiana and was the owner of the securities in question. Such residence and ownership gave jurisdiction for taxation.

(b)

**Concurring opinion of Judge Learned Hand.**

Judge Hand recognizes the distinction between criminal and penal cases and revenue cases, and states that, so far as he can find, no federal court has ever passed on the point as to whether in revenue cases an exception is to be made to the rule that a liability arising under the law of a foreign state will be recognized by the courts of another. Judge Hand said (Tr., fol. 44):

> "Generally it is, of course, true that a liability arising under the law of a foreign state will be recognized by the courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of the forum. A recognized exception is in the case of criminal and penal liabilities. * * * In some few cases this exception has been extended to include revenue laws as well. * * * But so far as I can find the point has never been passed on by a federal court."

The petitioner is in entire agreement with the reasoning of Judge Hand, except that he dissents from the final conclusion, that the exception above referred to should be extended to include obligations arising under revenue laws.

Judge Hand, deciding this question as one of first impression in the federal courts, states that in some few cases, in other courts, the exception has been extended to include revenue laws (Tr., fol. 44). He cites four cases as instances.

The petitioner believes that the case of *Colorado* v. *Harbeck*, 232 N. Y. 71, cannot properly be so construed. A full discussion of this case is contained in Point VIII of this brief, at p. 59. In the *Harbeck* case revenue acts were classified with criminal and penal laws. The decision assumed the classification and made no endeavor to support it by reason. The case was decided on a point of constitutional law and advances no reason for refusing to entertain jurisdiction of suits for tax obligations arising in another state if such jurisdiction may constitutionally be assumed.

The petitioner agrees that in the case of *Municipal Council of Sydney* v. *Bull*, (1909) 1 K. B. 7, the court was of the opinion that action could not be brought in one country to enforce the revenue laws of another country, but calls attention to the fact that the exact decision was that it was not the intent of the Australian statute, which authorized collection by suit, to authorize suit beyond the confines of the Colony, coupled with the fact that the action in question was a mixed action and, therefore, not transitory in nature.

The case of *Gulledge Bros. Lumber Co.* v. *Wenatchee Land Co.*, 122 Minn. 266, decided that the provision of a Washington statute, to the effect that no corporation should be permitted to commence or maintain any suit in any court of that state without alleging and proving that it had paid its annual license fee last due, was not operative outside the State of Washington to prevent the maintenance of suit. The statute in question had been construed by the Supreme Court of Washington as a revenue act but the Minnesota court treated the provision referred

to as a penal provision and so explicitly characterized it. Penal provisions of revenue acts are no more enforcible outside the state than are any other penal provisions. As the point Judge Hand was making was the distinction between revenue acts and penal acts, the *Gulledge Bros.* case does not serve as an illustration merely because the penal provision was found in a revenue act.

The case of *Attorney General for Canada* v. *William Schulze & Co.*, 9 Scots Law Times (1901-1902) 4, was a suit for the collection in Scotland of court costs incurred in Canada in the unsuccessful defense of an action to forfeit certain merchandise for an alleged infraction of the Canadian revenue laws. The suit in which the costs were incurred was highly penal. The basis of the decision in the Scotch court was that the imposition of costs constitutes an additional punishment, and also that the expenses of an action are always regarded as a mere accessory or incident of the principal claim.

Therefore, with the possible exclusion of the *Municipal Council of Sydney* case, none of the cases cited by Judge Hand are illustrations of the alleged exception.

Dicta are found in various cases to the effect that revenue acts are subject to the same exception as criminal and penal laws, but the research of counsel for the petitioner has failed to discover any cases, at least in appellate courts, in which the point was actually decided and applied.

Between penalties, which are inherently punitive, and analogous to the sanctions of criminal law, as to which the enacting state exercises sole jurisdiction, and the present civil cause of action, there is absolutely no analogy, either under authoritative precedent or in reason.

Penalties and punishments are inflicted to preserve the domestic order of the state and to prevent a repetition

of the offense within the enacting state, and hence are intended to have only a local application and enforcement. This can best be accomplished by meting out punishment in that state only, and not in some remote territory. "The proper place for punishment is where the crime is committed."

> *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 291.

The enforcement of criminal or penal sanctions is peculiarly a matter of local jurisdiction. The punishment of crime or the imposition of a penalty is determined by the degree of criminality or culpability. The question of the extent of a fine or other punishment is properly governed by local considerations and is a matter of judicial discretion. The duty of exercising such discretion is one which a foreign court could not well perform. Further, a penalty is subject to the control of the executive of the state by which the proceeding was authorized and it may be, at any time either before or after judgment, annulled by a pardon. A pardon, however, could not affect a judgment rendered in another jurisdiction.

> *Boston & M. R. R. Co.* v. *Hurd*, 108 Fed. 116; *Malloy* v. *American Hide & Leather Co.*, 148 Fed. 482.

Judge Hand points out the objections to passing on provisions for the domestic order of another state, and bases his conclusion on the premise that revenue laws fall within the same reasoning. He says (Tr., fols. 44-46).

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which in-

cludes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to untertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

"For these reasons I concur."

Judge Hand's reasoning is wholly inapplicable to revenue laws. Suits for the recovery of obligations accrued under revenue laws are mere suits for money judgments. The only relation between the foreign state (or its subdivisions) and its citizen is that of creditor and debtor. No relationship between the states is involved. The court can only render judgment for the

amount of the tax obligation or refuse to render such judgment. An adverse judgment can be no more detrimental to the interests of the foreign state than a refusal to entertain the suit, and the only serious embarrassment a neighboring state could suffer would be its inability to collect its revenues. Although revenue laws affect a state and its municipalities in matters as vital to their existence as criminal laws, the only vital concern is that the revenues be collected, and to refuse to entertain jurisdiction is to refuse relief in a matter which Judge Hand states is vital to the state's existence. Certainly, therefore, the vitality of the foreign state's concern is no reason for refusing relief.

Judge Hand reasons that the domestic state reserves the right to scrutinize the liability imposed by criminal and penal laws of a foreign state, because of the possibility that such liability might not accord with the policy of the domestic state. But no such clash with domestic policy could, under any circumstances, arise as to a property-tax liability *in personam* created by the foreign state; for the public policy of every state is, that taxes on property should be paid to the public corporations imposing them. Tax paying, not tax evasion, is consonant with public policy everywhere. The reference of the court in *United States* v. *Nashville, C. & St. L. Ry.*, 249 Fed. 678, 682, to "the general policy of the law to promote, rather than to obstruct, the collection of public revenue," is applicable to state as well as federal revenue.

There is, as a practical matter, no opportunity for differences of opinion between the federal court and a taxing state as to the public policy of a revenue measure. There is far greater similarity among state and federal revenue laws than among penal statutes of different states. Constitutional limitations on the taxing power of the states have been defined by the United States Su-

preme Court. There is no difference in policy between the Federal Government (or the several states) and any particular state in their tax programs, but all are in harmony on the propriety and necessity of property taxation. Details of the laws differ, but the broad principles of *ad valorem* taxation are the same. Not so as to penal statutes. These may embrace anything the legislature deems within the police power, requiring protection for its citizens in their health, morals, safety, or "general welfare," as determined by local needs, customs, education, morality, business or natural conditions.

The position of the State of Indiana with respect to the rights of Grant County in the pending controversy has been made clear by that state itself. The statutes pronounce that personal property taxes shall become personal obligations of residents in each year. Assessment has been made in the manner provided by statute. This action has been instituted under a statute specifically authorizing such suits, by an official therein specifically designated for that purpose. The only question involved is whether the money claimed in the complaint is due to Grant County, Indiana, and the municipal subdivisions thereof.

The inquiry necessary to determine whether comity will be extended, therefore, concerns no delicate questions between Indiana and its citizens or between Indiana and any other state, nor any policy of the State of Indiana, except a policy to which it has plainly and unquestionably committed itself. It is necessary for the federal court only to determine whether the Indiana laws in question agree with its own notions of what is proper. These laws are ordinary personal property tax laws. There can be no question as to their propriety.

The arguments advanced by Judge Hand are based on

the difference of jurisdiction only and not on any territorial consideration, and apply with full force to the enforcement by federal courts of criminal and penal laws of the state within which the court sits. Consistently therewith, a federal court will not enforce a penal law *even of the state in which the federal court sits.*

> *State of Indiana* v. *Alleghany Oil Co.,* 85 Fed. 870;
> *Perkins* v. *Boston Co.,* 90 Fed. 321;
> *Stichtenoth* v. *Central Exchange,* 99 Fed. 1;
> *Hamilton* v. *Schlitz Brewing Co.,* 100 Fed. 675.

The reason for non-enforcement is, that the federal and state sovereignties are distinct and independent. Offenses against one are not necessarily offenses against the other. Therefore the federal sovereignty sitting in New York will not punish infractions of the penal laws of the state sovereignty of New York, nor of any other state.

> *Huntington* v. *Attrill,* 146 U. S. 657, 672;
> *Southern Ry. Co.* v. *State,* 165 Ind. 613, 75 N. E. 272, 273.

As was held in *State of Indiana* v. *Alleghany Oil Co.,* 85 Fed. 870, 873:

> "The penal laws of the several states of the United States are regarded, so far as the jurisdiction of the United States is concerned, as laws of a foreign country."

If revenue laws fell within the reasoning applicable to criminal and penal laws, federal courts should refuse to recognize or enforce the revenue laws even of the state in which they sit. But, on the contrary, federal courts enforce such laws. Since, then, territorial considerations

are not the determining factor in the refusal of federal courts to enforce the criminal and penal laws of states, the territorial factor should not be interjected into the consideration of whether federal courts will enforce obligations arising under the revenue laws of states. Since the federal courts enforce revenue laws of the states in which they sit, it follows that they should equally enforce revenue laws of other states.

Federal courts take jurisdiction of suits brought for the specific purpose of compelling local tax officials to take steps to collect local taxes.

*Tennessee* v. *Whitworth,* 117 U. S. 129.

Thus, the right to issue a writ of mandamus has long been recognized as possessed by federal courts, to force state or municipal taxing officers to perform their duty in levying or collecting local taxes, or to cause them to be collected.

*Supervisors* v. *Rogers,* 7 Wall. 175, 180.

The federal court may assume jurisdiction over a case on removal which involves enforcement of local taxation against the removing party.

*In re Stutsman County,* 88 Fed. 337;
*Bristol* v. *Washington County,* 177 U. S. 133.

The above conclusion is strengthened by the policy of the Federal Government in opening its courts to states or their subdivisions for the collection of their tax claims in bankruptcy proceedings. Section 64a of the bankruptcy act directs the trustee to pay "all taxes legally due and owing by the bankrupt to the United States, *state, county, district or municipality,* in advance of the payment of dividends to creditors, and in case any question arises as

to the amount or legality of any such tax, the same shall be heard and determined by the court." (Italics ours.)

Under this section, state taxes have been allowed and paid in districts located outside the taxing state; the federal courts refusing to confine the statute to local taxes only.

*In re United Five and Ten Cent Store, Inc.*, 242 Fed. 1005 (District Court, S. D. N. Y.);

*In re Thermiodyne Radio Corp.*, 26 F. (2d) 716 (tax claim of New York allowed in District of Delaware).

This practice of the national courts indicates that tax liability, whether regarded technically as a debt or not, is such a claim or demand in the hands of states and their subdivisions, that it will be enforced in any federal court having jurisdiction of the bankruptcy proceedings. Such an attitude is wholly inconsistent with the theory that federal courts do not aid in the collection of taxes assessed outside their districts.

## Point IV.

**Refusal to enforce revenue laws extraterritorially has its origin in conditions of commercial rivalry between nations. The reasons underlying such refusal are wholly inapplicable as between the nation and its constituent states.**

The history of refusal to enforce revenue laws extraterritorially is dealt with in a most enlightening note in the June, 1929, issue of the Columbia Law Review, in which the decision of the Circuit Court of Appeals in the present litigation is discussed.

Columbia Law Review, Volume XXIX, No. 6, page 782.

In certain English cases the doctrine was developed that the courts of England would not enforce the revenue laws of a foreign country. These cases were based on commercial expediency. The basis of the doctrine was harm to British commerce. The doctrine was first announced in this country in a dictum in

*Henry* v. *Sargeant,* 13 N. H. 321, 332, (1843),

a case of false imprisonment, no enforcement of a revenue law being involved. Since then various dicta have appeared, to the effect that the courts of one state would not enforce the revenue laws of another state, but, as said in the Columbia Law Review note above referred to (p. 791):

> "No case in an appellate court in the United States has squarely decided that one state will not enforce the revenue laws of another if all constitutional requirements have been met."

The English cases above referred to were cases of international law, as distinguished from interstate law. The reason for such refusal manifestly has no application as between the United States and the several states thereof. Even were there sufficient reason to apply the rule as between the several states of the Union, as for instance, a desire to keep the property of the tax-debtor within the state's territory for the benefit of its own citizens, no such reason obtains as between the nation and the states. The policy of the nation toward the states is one of co-operation and not of rivalry. The said note in the Columbia Law Review reaches the following conclusion (p. 787):

> "Without the existence of these reasons of policy there seems to remain no valid justification for not permitting a suit in one state on a tax lawfully

levied by another. The simplest ideas of comity would compel such result."

## Point V.

**Personal property taxes, under the laws of Indiana, were due and became the personal obligation of taxpayers in each year, whether or not the amount thereof had been fixed by assessment. The obligations here sued upon became the personal obligation of the decedent in each year of his residence in Grant County, and were his personal obligation at the time of his death. No assessment was necessary to fix the liability.**

Under Indiana law, general property taxes are a *personal* liability of the owner. As held in *Prudential Casualty Co.* v. *State,* 194 Ind. 542, 143 N. E. 631:

> "We think that it should be regarded as settled in this state that general taxes constitute a personal liability against the owner of the property upon which the assessment is based. Taxes, as distinguished from assessments for local improvements, are imposed on the person, rather than on the property which is resorted to merely for the purpose of ascertaining the amount. The weight of authority is that where taxes are viewed as creating a personal liability, the state" (here, the county) "is not restricted to the methods of collection prescribed by statute, but may maintain an action at law therefor."

*Mullikin* v. *Reeves,* 71 Ind. 281, 284;
*Funk* v. *State,* 166 Ind. 455, 457;
*Darnell* v. *State,* 174 Ind. 143, 90 N. E. 769 (affirmed in 226 U. S. 390);
*Wright* v. *House,* 188 Ind. 247, 256, 121 N. E. 433, 436.

The statutes of Indiana effectively stamp the tax liability as a personal obligation, and they leave no doubt that it is not merely a liability *in rem*.

> Burns' Stats. 1926, Sects. 3229, 14246, 14204, 14194, 14048, 14052, 14349, 14387, 14299, Acts 1927, p. 142.

A lien upon all property as security for the current year's taxes attached on March first of each year. The statutes read:

> "*All the property,* both real and personal, situated in any county, *shall be liable for the payment of all taxes, penalties, interest and costs, charged to the owner thereof* in such county, and no partial payment of such taxes, penalties, interest or costs shall discharge or release any part or portion of such property until the whole is paid; *which lien* shall in nowise be affected or destroyed by any sale or transfer of any such personal property, *and shall attach on the first day of March, annually, for the taxes of such year.*" (Italics ours.)
>
> Burns' Stats. 1926, Sect. 14288.

> "The lien of the state for all taxes for State, County, School, road, township and all other purposes, and all taxes for city, town or municipal purposes, shall attach on all real estate on the first day of March annually."
>
> Burns' Stats. 1926, Sect. 14383.

The personal obligation arises at the same time that the lien attaches. There can be no lien unless there is a liability which it secures. A lien is necessarily predicated

on an obligation, which must be in effect at the time the lien arises. On this point the opinion of Judge Learned Hand is clearly sound in stating (fol. 43):

> "I think that a personal liability was imposed upon Breed before his death, which was after March 1. That is the date when the tax is imposed and when the lien attaches to any property within the State. It can hardly be that the lien arises before the liability and the assessment may be, and in my judgment should be, considered as no more than a liquidation of a liability already existing. • • • Hence it seems to me that the liability was valid."

The term "lien" connotes "liability," and was obviously used by the legislature with that implication.

> *Vidal* v. *South Amer. Co.*, 276 Fed. 855, 870;
> *In re Ransford*, 194 Fed. 658, 115 C. C. A. 560;
> *Hardin* v. *Kelley*, 144 Fed. 353, 75 C. C. A. 355;
> *Hubble* v. *Berry*, 180 Ind. 513, 103 N. E. 328, 330;
> *Bell* v. *Hines*, 16 Ind. App. 184, 44 N. E. 576, 577.

The Indiana decisions fully support the foregoing conclusions. These hold, without variation, that the lien and the individual obligation arise at the same time, viz., on March 1. Thus, in *Barnum* v. *Rallihan*, 63 Ind. App. 349, 112 N. E. 561, 565, the court said:

> "Where taxes have accrued upon the real estate of a person before his death, *they become a charge against him, as well as a lien upon all his property*, and such taxes should be paid by his executor or administrator out of the personal estate if sufficient for that purpose • • •. By the statute the taxes

> for each year attach and become a lien upon both real and personal property on the 1st day of March annually, though the same are not due and payable until the following year, and will not become delinquent until after the first Monday in May. *While not expressly so stated, our decisions seem to treat all taxes as accruing on the first day of March when the lien thereof attaches to the property assessed.* (Citing Indiana cases.) The taxes which accrued and became a lien upon the testator's undivided one-half of the aforesaid northwest quarter section of real estate on March 1, 1910, prior to his death, were a claim against him, and should have been paid by the executrix out of his personal estate." (Italics ours.)

In *Beard, Treas.*, v. *Allen*, 141 Ind. 243, 248, the court regarded the existence of the lien and the existence of personal liability of the property owner as arising simultaneously. At p. 248 it was said:

> "It appears from the provision of the tax law cited that *this lien is made perpetual for all taxes due from the owner*, and that all property owned by the tax debtor, both real and personal, situated in any county, is made liable for the payment of all taxes *charged to him or her.* * * * The liability thus incurred ceases only with payment." (Italics ours.)

It is obvious that there is a difference, as to the character and extent of personal obligation during the current year, between a resident who owns taxable property on March 1, none of which he returns for taxation, and a resident who acquires taxables after March 1. Both are under a *general* civic duty to pay taxes. But that duty

becomes *definite, specific* and *personal* on March 1 of each year, with respect to the property owned on that date. If no property is then owned, no tax then accrues. The property owner is, by law, made an assessor of his own property as of March 1, annually. (Burns' Stats. 1926, Sect. 14100); his assessment to stand unless altered by the tax officials. (*DuBois* v. *Board,* 4 Ind. App. 138, 30 N. E. 206.) If such owner fails to perform this duty as an assistant of the taxing authorities, but conceals his property and places no value upon it, neither he nor his estate should thereafter be permitted to take advantage of his delinquency by attempting to avoid the personal liability which, if he had performed his duty by disclosure and valuation, would unquestionably have attached on March 1, and which did then attach as to every owner who complied with the law.

After March first the taxes are liabilities of the taxpayer, even before assessment; and after his death they are liabilities of his estate, even though there be no assessment until after his death. *Assessment is not a condition precedent to the liability of the estate to pay such taxes.*

> *Re Franklin,* 26 Misc. 107, 56 N. Y. S. 858;
> *Bogue* v. *Laughlin,* 149 Wis. 271, 282, 136 N. W. 606.

That taxes may accrue before their amount is definitely computed is shown by Burns' Statutes of Indiana, 1926 revision, Section 14217, sixth item, where tax levies prior to 1919 were repealed but with this qualification:

> "Such repeal shall not release or cancel any taxes *accrued* under such levies and such levies shall remain in force for *computation* of taxes on property *omitted from assessments heretofore made.* (Italics ours.)

The statute, authorizing payment of taxes by an executor, reads:

"Unless otherwise provided in this act the *debts and liabilities* of a decedent, shall, if his estate be solvent, be paid in the following order of classes. * * * *Fourth.* Taxes *accrued* upon the real and personal estate of the decedent at his death." (Italics ours.)

Burns' Stats. 1926, Sect. 3229.

In *Buck* v. *Miller, Treas.*, 147 Ind. 586, 598, the county treasurer assessed omitted taxes on personalty in Indiana, owned by Nash, such assessment being made *after his death,* but covering 12 years prior thereto. In sustaining the action of the treasurer, the court said, p. 598:

> "He (Nash) *died owing certain taxes which he had avoided paying for a great many years. Those taxes have now been assessed* in pursuance of statutory provisions for the assessment of omitted property. The taxes are a lien on all property in the county belonging to his estate. This lien can be released only by payment of the taxes. *He could not by giving away his property relieve it of the burden cast upon it by the law.*" (Italics ours.)

In *Graham* v. *Russell, auditor,* 152 Ind. 186, the auditor sought to set aside the final report filed in the estate of Graham, and to reopen the estate. The complaint alleged that decedent died on July 29, 1895, "leaving a liability for taxation due against his estate for state and county purposes to the amount of $3,000 on account of his failure to list and return all of his property for taxation" (p. 189) for which amount it was alleged his estate was still indebted.

There had been no assessment of the omitted property prior to the filing of the final report and discharge of the

executor, nor prior to the filing of the petition to open the estate, the omission not having been discovered until June 1, 1897.

The court held that the taxes had *accrued in the lifetime of the testator* and consituted an existing obligation at the time the estate was closed. The auditor's petition was granted.

The court said, p. 192:

> "Appellee was, at least, interested * * * in seeing that the taxes, which had accrued by reason of the omitted property, should be paid by the estate of the defaulting decedent * * *. The estate in question, it appears, had been finally settled and its assets turned over to appellant, leaving the matter in regard to the taxes now in controversy still virtually pending unsettled *as a liability for which the estate should account* * * *.
>
> "The facts disclose that the decedent had for many years prior to his death failed to list and return for taxation a large amount of his property, and at his death it is charged he was liable for the payment of taxes, on account of his said default, in the sum of $3,000 and over, *which had accrued and were due* for state, county, and township purposes. * * * He, while in life, owed as one of the highest duties to the government, the duty to pay all taxes imposed upon his property liable to taxation. As a compensation for the discharge of this duty, the state afforded him protection to his life, liberty, and the due enjoyment of the property with which he had been blessed, and the discharge of this duty, if the decedent is shown to have omitted it, must rest upon his estate. *With or without knowledge of the existence*

> *of this liability of her decedent, it existed all the same against the property of his estate until paid,* unless barred by some provision of law.
>
> *"With this charge or liability against the estate,* she, immediately after the expiration of the year allowed by law, procured it to be declared by the court as finally settled, and secured her discharge from further administration of her trust. * * * It follows from what we have said that the petition is sufficient." (Italics ours.)

In *Henderson* v. *Whitinger, Adm.*, 56 Ind. 131, 132, the court declared:

> "Where taxes have accrued upon the land of a person before his death, they become a *personal charge* against him *as well as a lien upon the property;* and it seems to us that such taxes should be paid by the executor or administrator, because they are *debts against the estate."* (Italics ours.)

The annual accrual of the personal liability as a present obligation on March 1 is not prevented by the exact amount of taxes not being ascertained (i.e., liquidated) until a later date. Numerous analogies in the law show that the personal obligation may exist prior to the ascertainment of its precise extent. There may be a stockholder's existing statutory liability for undetermined corporate debts; a surety's liability for the principal's unliquidated obligation; undetermined claims filed in bankruptcy; unliquidated demands used as set-off; unmatured obligations chargeable against a decedent's estate under Burns' Stats. 1926, Sects. 3155, 3156. An apt analogy is, the personal obligation for unascertained customs duties owing the Government. All dutiable goods entering the United States, subject the consignee to *personal liability,*

even before the precise amount of duty is determined. As held in *United States* v. *Cobb*, 11 Fed. 76, 79, quoted with approval in *United States* v. *Sherman Co.*, 237 U. S. 146, 153:

> "The summary proceedings which the customs officers are required by law to take against the goods are in the nature of proceedings *in rem.*, but are not the sole remedies of the government for the collection of its duties. * * * The act makes the duties a *personal debt or charge upon the importer, which accrues to the government immediately upon the arrival of the goods at the proper port of entry. They are due although the goods have been smuggled or for any reason have never come to the hands of the customs officers,* or the statutory proceedings have never been instituted, or through accident, mistake or fraud no duties or short duties have been paid; and the importer is not discharged *from his debt* by a delivery to him of the goods without payment." (Italics ours.)

Accord,

*Dumont* v. *United States*, 98 U. S. 142, 144.

Goods smuggled or never coming into the hands of the customs officers are similar in status to property omitted from the owner's tax lists. In the one case the customs duties, and in the other the taxes, are "accrued" and "due" from the owner forthwith; even before the public officers are aware of the property's existence. The owner's obligation is *debitum in presenti, solvendum in futuro.*

*Meredith* v. *United States*, 13 Peters, 486, 493, 494;

*Stockwell* v. *United States*, 13 Wall. 531, 546.

As held in *Meredith* v. *United States, supra:*

> "The question has also been asked, at what time the right of the government to the duties *accrues* in the fiscal sense of the terms. The answer is, *at the time when the goods have arrived at the proper port of entry.*" (Italics ours.)

Similarly it can be asked: "At what time did the right of Grant County to the taxes on Breed's taxable property accrue?" The answer is: "At the time the property should have been disclosed to the taxing authorities; viz., March 1 of each year."

On the taxing date of each year in which a tax return is omitted there arises a vested right to the taxes collectible if the property had then been returned for taxation as required by law. This vested right is possessed by the several subdivisions entitled to receive the taxes. It has been expressly recognized by the Supreme Court of Indiana. In *Reynolds, Auditor,* v. *Bowen, Adm.,* 138 Ind. 434, 447, the court said:

> "If these taxes were unpaid, they belong to the state. They are the state's property, and the right of the state to them never ceased."

In *Saint, Treas.,* v. *Welsh,* 141 Ind. 382, an executor sued to enjoin the county treasurer from collecting taxes against decedent's estate, assessed on omitted property for the years 1885 to 1890, both inclusive. Decedent died in 1890. Assessment was made in 1891 under a statute enacted in that year empowering the county assessor to list and assess "any omitted property * * * which should be assessed." The Tax Act of 1881 had required every taxpayer to list and return for taxation all his personal property owned on April 1 in each year. It was held that the repeal of the act of 1881 by the act of 1891 did not relieve dece-

dent or his estate from the liability which had accrued each year under the former act.

On page 388 the court said:

> "The right of the state to the taxes in question upon the property omitted by the decedent, prior to the act of 1891, *is not created by this last law but arises under that of 1881.* No such conclusion can be placed upon the statute of 1891 as would authorize a court in holding that the legislature, by any of its provisions, intended to affect the primary right of the state to recover these taxes, *accrued to it under the former law,* for the years mentioned. The tax law of 1891 simply granted to the state as a remedy, or in other words, provided certain means as a procedure to enforce *a right which existed in its favor under a former statute,* namely, that of recovering the taxes to which it was entitled by the act of 1881, and which right the law of 1891 did not abrogate. *It impaired no vested rights of the taxpayer,* and the recovery of the taxes involved in the case at bar was a fair subject for the application of retrospective legislation." (Italics ours.)

The above decisions of the Supreme Court of Indiana are sustained by *Sturges* v. *Carter,* 114 U. S. 511, 518, where this Court held:

> "In substance, this contention is that a taxpayer who has been evading the payment of the taxes due from him by making false returns, can shield himself behind the annual settlement made by the auditor with the treasurer in which his returns were assumed to be true, and that the legislature can pass no act by which the falsity of the returns can for a limited period (in this case four years) be exposed, and the payment of the taxes enforced—in

other words, *that the taxpayer has a vested right in the fruits of his false returns. Such a proposition cannot be sustained. Foster* v. *Essex Bank,* 16 Mass. 245.

"In our opinion, no right of the taxpayer was invaded by the act of 1878. *His investments in bonds and stocks were subject to taxation; the taxes upon such investments were due to the state,* and the act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. *It gave a new remedy to the state for enforcing a right which it had all the time possessed, namely, the right to the taxes upon property liable to taxation.*" (Italics ours.)

Breed's investments in intangibles were subject to taxation in Indiana during his life. Those taxes were due to Grant County and its subdivisions. The act authorizing the auditor to assess omitted property and the Act of 1927, authorizing treasurers to sue for taxes such as are here involved, gave remedies for enforcing a right which Grant County and its subdivisions all the time possessed, viz., the right to the taxes upon property liable to taxation. As against this claim neither Breed nor his estate had any vested right in the fruits of his failure to return his taxable property.

In the instant case, the proceedings by the auditor after Breed's death were not taken for the purpose of creating, *de novo,* a right to the omitted taxes. They were steps for the enforcement of a statutory remedy for the recovery of *already accrued taxes* to which, in every year of omission during Breed's life, the county and its subdivisions had a vested right because of his residence and ownership. That right could not be divested by Breed's death. Being

a personal obligation (already accrued under the statute) it survived. The remedy for its enforcement was recognized by the Act of 1927 under which this suit is brought.

We respectfully submit:

The nature of the tax obligation sued upon is personal rather than *in rem*. Assessment was unnecessary to fix the tax obligation, although necessary to liquidate the amount thereof. The fact that no assessment was made prior to Breed's death, therefore, did not prevent the accrual of the obligation. The obligation accrued on March first of each year against Breed, and subsists as a claim against his estate.

## Point VI.

**The conception of tax liability entertained by the Federal courts and by the courts of Indiana differs from the conception entertained by certain of the state courts. Under the former conception, at least, no principle of law prevents suit in a jurisdiction extraneous to the taxing jurisdiction.**

The *Harbeck* decision, discussed under Point VIII hereof, at p. 59, is based upon a conception of tax liability radically different from the conception of such liability entertained by the federal courts, but which is entertained by the courts of some of the states, to wit: that tax acts impose no obligation that is enforcible except under the express or implied terms of the act providing for the tax; that taxes may not be collected except in accordance with the provisions of the act, and that unless there be some statutory authority in the act no action for collection will lie; that taxes are not debts, and that no interest runs on delinquent taxes unless so expressly provided by the statute.

Under this conception, liability for taxes is a most restricted obligation, which, it is perhaps arguable, it would be

improper for the courts of a foreign jurisdiction to enforce. The Indiana conception of tax liability, as shown *supra*, Point V, p. 25, is not so restricted. The Indiana statutes create general obligations which under the decisions of the Indiana courts are debts.

> *Mullikin* v. *Reeves*, 71 Ind. 281, 284;
> *Funk* v. *State*, 166 Ind. 455, 457;
> *Darnell* v. *State*, 174 Ind. 143, 90 N. E. 769;
> *Prudential Casualty Co.* v. *State*, 194 Ind. 542, 143 N. E. 631.

The courts of a sister state do not necessarily adopt the conception of tax liability held by the courts of the taxing state. But the federal conception of tax liability accords entirely with the Indiana conception and, therefore, in the federal courts Indiana taxes are general obligations, whether or not technically entitled "debts."

Although the *Harbeck* case was decided on a point of constitutional law the decision was unquestionably influenced by the restrictive conception of the nature of tax obligation entertained by the court. Even though there be a principle of private international law which would preclude the New York courts from enforcing such restricted obligations as the New York courts hold taxes to be, no such principle would apply in the federal courts.

Obligations arising under the laws of foreign states will be enforced under the principles of comity unless the public policy of the trial jurisdiction is contrary to such enforcement. Such public policy will depend in large measure upon the conception entertained in that jurisdiction of the nature of the cause of action—in this case the nature of the liability for personal property taxes.

Under the statutes of Indiana, as construed by the Indiana courts, personal property taxes are debts. The courts of the United States hold that, at least where so

intended by the statute, taxes are debts and that taxes may be collected by suit when there is a sum due, either certain or readily reduced to a certainty, which is a personal liability. Such is the liability in the instant case. Even assuming that under the stringent conception of tax liability entertained in the *Harbeck* and similar decisions, comity might be refused in the enforcement of tax liability, the fudamentally different conception of tax liability entertained by the federal courts would dictate a contrary policy.

We find the federal rule illustrated in the case of *Billings* v. *United States,* 232 U. S. 261, where the Government sued for a federal excise tax upon foreign-built yachts. This case authoritatively distinguishes the federal rule from the state rule. The court there said (p. 285):

> "To avoid prolixity we do not review the state cases as to non-liability for interest on default of taxes but content ourselves with stating that we think it is apparent that the conclusion which they sustain, leaving aside minor differences rests upon two fundamental propositions: First, the necessity for an express statute providing for interest except in cases of contract, and second, that even where there is a statute providing for interest on all debts, such statute is not applicable to taxes because they are not debts and therefore must be enforced alone by virtue of express legislative penalties, except where a provision exists giving *eo nomine* interest on taxes. But both of these propositions are in conflict with the settled doctrine established by the decision of this court. Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accord-

ance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed. *Young* v. *Godbe,* 15 Wall. 562, 565:

> " 'It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonable withholding payment of an overdue account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character.'

"And the decisions of this court have often since exemplified the principle by considering the question of the responsibility for interest from the point of view of reason and justice even though no express statute existed for compelling this payment. So also as to the nature and character of the obligation to pay taxes. As long ago as *Meredith* v. *United States,* 13 Peters 486, it was decided, the court speaking by Mr. Justice Story (p. 493):

> " 'It appears to us clear upon principle, as well upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer * * *'

"Again in *United States* v. *Chamberlain,* 219 U. S. 250, the nature and character of an obligation to pay a stamp duty was considered, and the right to collect it by action of debt was passed upon and it was held that the obligation to pay was a debt and

that it could be enforced by suit in the absence of an exclusive remedy created by the statute by which the obligation was imposed. In the course of the opinion, various decisions of this court recognizing the right of the United States to enforce internal revenue duties by suit were referred to and the statute to the same end was cited and its application to the case in hand was pointed out upon grounds which in reason may well be said to cause the statute to be applicable to the case here before us. In addition, in repeated adjudication in this court it has been settled that in a suit to recover taxes which have been illegally assessed interest would be allowed against the official although the real responsibility was on the Government. The concluded doctrine on this subject was thus stated in a recent case after referring to the exemption of the United States from liability for interest (*National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496):

> " 'On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is, that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the Treasury. *Erskin* v. *Van Arsdale*, 15 Wall. 75; *Redfield* v. *Bartels*, 139 U. S. 694.'
>
> *"The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory*

*authority, in the other the right to sue for taxes as for a debt in every case where not prohibited by statute.*

"From this review it results that the doctrine as to non-liability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules." (Italics ours.)

The tax under consideration in the *Billings* case was a federal tax, but the reasoning applies equally to suits arising out of a liability for state taxes. The nature of the obligation is determined primarily by the enacting state. A tax intended not to constitute an obligation collectible by action, but to be collected exclusively by the statutory remedy, could not be transformed into a different obligation. The Indiana courts, however, have held that taxes constitute debts collectible by suit, and the Indiana statutes have in terms so provided. The Indiana decisions are entirely in harmony with the federal decisions.

In *United States* v. *Chamberlin*, 219 U. S. 250, an action was brought to recover the amount of a documentary stamp tax, payable under the War Revenue Act of 1898. The only question was whether or not the tax could be collected by action. The court lays down this preliminary proposition (p. 258):

"If the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action may be regarded as well brought."

It comments on the common law rule as follows:

> "At common law, customs duties were recoverable by the Crown by an information in debt or exchequer information in the nature of a bill in equity for discovery and account. These informations rested upon the general principle 'that in the given case the common law or the statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the importation, and that, therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown.'"

The court refers to various preceding cases under other federal tax acts and reaches the following conclusion (p. 262):

> "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used. But whether the Government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive. Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty."

The court found that the act in question imposed a personal obligation (p. 263) and contained nothing to negative its collection by action (pp. 263 and 269). The right of action was therefore sustained.

Taxes of all kinds are held to be debts that may be made the subject of a suit by the Government, irrespective

of whether or not other remedies may exist for their collection.

*Billings* v. *United States,* 232 U. S. 261, 287;
*United States* v. *Chamberlin,* 219 U. S. 250, 262;
*Dollar Savings Bank* v. *United States,* 19 Wall. 227, 237, *et seq.;*
*United States* v. *Erie Ry.,* 106 U. S. 327;
*United States* v. *Nashville Ry.,* 249 Fed. 678, 683-4;
*United States* v. *Grand Rapids Ry. Co.,* 239 Fed. 153;
*United States* v. *Minn. Threshing Machine Co.,* 229 Fed. 1019, 1020;
*United States* v. *Mexican R. Co.,* 154 Fed. 519;
*United States* v. *National Fibre Board Co.,* 133 Fed. 597;
*United States* v. *Cobb,* 11 Fed. 76, 79;
*United States* v. *Hathaway,* 3 Mason 324, 325, 326, Fed. Cases No. 15983;
*United States* v. *Phelps,* 17 Blatch. 312, 315;
*United States* v. *Pacific R. R.,* 4 Dillon 66, 67-69.

In the case at bar, there was always a duty imposed upon the decedent by the laws of Indiana (the state of his residence) to report for taxation his personal property in that state for the purpose of enabling the taxing officials to value it for taxation purposes, and a duty to pay the taxes levied thereon. These taxes became due and payable on a day certain in each year. The sums due were readily reduced to certainty, had he listed his property. These sums have since been rendered absolutely certain by the acts of the tax officers of Grant County in duly assessing his omitted property and in extending taxes thereon, upon

notice to the defendants and an opportunity for them to be heard. All of the circumstances are here present which evoke the doctrine set forth in the *Chamberlin* case.

There can be no distinction in principle between a tax for which the Federal Government may sue as for an indebtedness, and a tax sought to be recovered by a subdivision of a state. The authority of the court is the same in each. Hence the foregoing federal decisions are applicable to the case at bar.

The federal decisions, since they are in entire accord with the Indiana conception of such obligation, establish that for the purpose of suit the obligation for Indiana personal property taxes is a debt. Certainly there is no public policy hostile to the collection of debts in a jurisdiction other than that in which they arise. Even waiving the definition, the federal cases clearly indicate that there can be no public policy hostile to the collection, in the federal courts, of personal obligations of such a nature as those courts consider to be the nature of tax obligations.

Under the federal conception of the nature of tax liability, therefore, the United States courts should enforce such liability arising under the statutes of a state, even considering the United States courts as courts of a foreign jurisdiction. But the laws of the several states are not foreign to the United States courts. It is elementary that the United States District Court for the Southern District of New York is not a court charged with the administration of the laws of New York alone. It also enforces the laws of the State of Indiana applicable to cases properly before it. The jurisprudence of Indiana is not foreign to the court. The situation differs from that involved in a suit by a citizen of Great Britain, or any other foreign power, who bases his right to sue in a federal court upon a foreign statute. Federal courts do not sit to administer the laws of foreign countries. But they *do* sit to ad-

minister state as well as United States statutes. For that reason the District Court takes judicial notice of the laws of Indiana and should enforce them, even where a New York State court might decline to do so.

In the leading case of *Owings* v. *Hull*, 9 Pet. 607, the federal court, sitting in Maryland, was held required to recognize and enforce the laws of Louisiana. The Supreme Court held (p. 625):

> "We are of opinion, that the circuit court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. *That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved, in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established;* but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts." (Our italics.)

To the same effect are:

> *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751;
> *Mills* v. *Green*, 159 U. S. 651, 657;
> *Dennick* v. *Central R. R. Co.*, 103 U. S. 11, 17;
> *Gormley* v. *Bunyan*, 138 U. S. 623, 635.

The laws of Indiana, under which this tax liability arises and by which the county treasurer is authorized to bring suit, are therefore not foreign to this Court and to the court below. The reasons advanced for refusal of *state* courts to recognize and give effect to the laws of a sister state have no application. In the latter courts, the laws of other jurisdictions are mere *facts,* not laws. In the federal courts they are *laws,* with all the incidents of legislative enactment.

Therefore, since obligations accrued under revenue laws are transitory actions of a civil nature such as, in the absence of a public policy to the contrary, are enforced in the courts of foreign jurisdictions, and since the reasons for the exception to the rule for enforcement applicable to criminal and penal statutes are wholly inapplicable to revenue acts, and since there is no public policy of the United States under which the comity of the federal court should be refused, the district court should have assumed jurisdiction of the present cause of action.

## Point VII.

**Extraterritorial imposition of tax liability must be distinguished from extraterritorial enforcement of such liability. The latter is constitutionally unobjectionable.**

The Circuit Court of Appeals, in its prevailing opinion, fell into the error which appears in the *Harbeck* and other cases, of confusing two entirely distinct matters, viz.: the imposition of liability and the enforcement of liability. The opinion treats the question of whether liability, validly incurred, may be enforced in another jurisdiction, as the equivalent of the question whether liability may be imposed extraterritorially. These are both treated as constitutional questions, although the

Constitution does not touch in any way the question of such enforcement.

The prevailing opinion states: "With the appellees and property without the state, and the estate being administered in New York, the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclhde one state from acting as a collector of taxes for a sister state and from enforcing its penal and revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the federal Constitution (Amendment 14), limited to persons and property within its jurisdiction (Tr. fol. 37)." After citing *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, and commenting on *New York Trust Co.* v. *Island Oil & Transport Corp.*, 11 Fed (2d) 689, and *State of Colorado* v. *Harbeck*, 232 N. Y. 71, the opinion proceeds: "The tax laws of one state cannot be given extraterritorial effect, so as to make collections through the agency of the courts of another state. Indiana's political subdivision, Grant County, is limited in the payment of taxes to property found within its boundaries." (Tr. fol. 38.) After citing several cases which were either penalty cases or cases decided in courts of minor jurisdiction the court says (Tr., fols. 39, 40): "The appellant's argument that the extraterritorial imposition of a tax is to be distinguished from the extraterritorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment, and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution (Amendment 14), Indiana has no jurisdiction to impose a tax, because neither

the property nor the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national District Court outside the state to collect such tax."

These quoted portions of the prevailing opinion proceed partly upon the theory that no tax was imposed and no liability had accrued prior to the death of the decedent. Judge Learned Hand's opinion was to the contrary. The petitioner believes that it is demonstrated in Point V of this brief that the liability accrued and became a personal liability of the decedent during his lifetime and while he was a resident of Grant County, Indiana. If this be true, those portions of the prevailing opinion which are based on the theory that no tax was imposed until after the death of the decedent are without foundation in law.

The prevailing opinion blends and confuses the two questions of extraterritorial imposition and extraterritorial collection of tax liability. These two questions, however, are absolutely separate and distinct. Extraterritorial imposition of tax liability is prohibited by the Constitution. The Constitution is silent as to the collection of tax liability accruing in a sister state.

The revenue laws of one state have no force in another *ex proprio vigore.* No revenue law of Indiana can create a single right or liability, unless there be some person or property subject to the jurisdiction of Indiana upon which the statute can operate. No revenue law can extraterritorially give rise to obligations. This, however, is not a peculiarity of revenue laws. It is equally true of every law, whether statutory or otherwise. On the other hand, it is elementary that *obligations arising from the laws of a state,* whether statutory or otherwise, are enforcible in other states. Enforcement of the liability outside the state in which it arises is a commonplace. When liability has attached by virtue of a statute, such

liability does not evaporate at the border. Otherwise, all citizens would shed all rights at the state line. Extraterritorial enforcement of accrued rights is a matter entirely distinct from the extraterritorial enforcement of statutes, *as such*, by the imposition of obligations outside the jurisdiction. A revenue act is ineffective to impose any obligation upon persons or property not subject to the jurisdiction of the state. But when, as here, the obligation has accrued under the express provisions of the state statute, the enforcement of the obligation outside the territorial limits of the state does not involve extraterritorial operation of the statute. Courts sit to enforce rights, not laws, and although laws have no efficacy to create rights and liabilities beyond the border, rights and liabilities accrued thereunder in the taxing state may follow persons or property across the border, and the enforcement thereof beyond the state jurisdiction involves no extraterritorial efficacy of the statute creating the right or obligation.

Recovery in a foreign jurisdiction, of a judgment for accrued tax liability, would constitute merely the enforcement of a transitory civil cause of action under the ordinary principles of comity, and would involve no extraterritorial enforcement of the statute. Recovery, in a foreign jurisdiction, of a judgment under which defendant's property could be taken, when, by reason of the absence of the person from the taxing jurisdiction, or for whatever reason, no personal liability had theretofore been imposed by law upon the defendant, in the taxing state, would effect the taking of property, and the consequent enforcement of the revenue act by means of the judgment, and would, therefore, constitute enforcement, by means of such judgment, of the revenue laws of another state *as such* and would give such laws extra-

territorial effect, thereby directly contravening the due process clause.

The taxing power is limited to persons and property within the state's jurisdiction. But this means only that the state's power is so limited as to the *imposition* of liability. If liability be imposed within the state's jurisdiction, there arises a transitory civil liability, an obligation to pay the tax, which being no part of the law *as such* is excluded from the operation of the principle which precludes the enforcement of the revenue laws of a sister state *as such*.

The distinction is illustrated in the following cases:

In *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, the action was brought in tort to recover damages for injury resulting in death, the cause of action arising under a Massachusetts statute, the question involved being whether a right of action under that statute might be enforced in the New York courts (p. 102). The court recognized that the courts of no country execute the penal laws of another country, but held that, although the statute had penal features, it was not in substance penal (p. 102, *et seq.*) Judge Cardozo said (p. 106):

> "A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids. That is the generally accepted rule in the United States (*Huntington* v. *Attrill*, 146 U. S. 657, 670; *Stewart* v. *B. & O. R. Co.*, 168 U. S. 445; *N. Pac. R. R. Co.* v. *Babcock*, 154 U. S. 190; *A. T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 67, 68; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478, 479; *Howarth* v. *Lombard*, 175 Mass. 570; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527, 530)."

And at page 110, he said:

> "A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found.' (*Slater* v. *Mex. Natl. R. R. Co.*, 194 U. S. 120, 126; *Lauria* v. *Du Pont De Nemours & Co.*, 241 Fed. Rep. 687; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478). 'No law can exist as such except the law of the land; but • • • it is a principle of every civilized law that vested rights shall be protected' (*Beale, Conflict of Laws*, Sec. 51). The plaintiff owns something, and we help him to get it (*Howarth* v. *Lombard*, 175 Mass. 570; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527; *Walsh* v. *N. Y. & N. E. R. R. Co.*, 160 Mass. 571; *Beale, Conflict of Laws*, Secs. 51, 73). We do this unless some sound reason of public policy makes it unwise for us to lend our aid."

In *Howarth* v. *Lombard*, 175 Mass. 570, 572, 56 N. E. 888, it was said:

> "The fundamental question is whether there is a substantial right originating in one state, and a corresponding liability which follows the person against whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced *ex comitate* in another state unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him."

In *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, two actions against an initial interstate carrier for failure to deliver merchandise were brought in a Texas state court. The Supreme Court said (p. 490):

> "The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress.
>
> "Statutes have no extraterritorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another state. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and the state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by federal statute. *Robb* v. *Connolly,* 111 U. S. 624, 637."

Revenue acts have no inherent peculiarity, as distinguished from other statutes, which would make the extra-

territorial enforcement of obligation arising thereunder the equivalent of extraterritorial operation of the statute itself. Therefore, enforcement of the obligation outside the jurisdiction in which the obligation arises is subject to no constitutional objection.

Applying the foregoing principles to the case at bar: the taxes here involved were not original creations springing up in the State of New York during Breed's lifetime or afterwards, by force of Indiana tax legislation. They were Breed's personal obligations incurred each year in Indiana by reason of his residence in Indiana and his ownership of intangible personal property, taxable to him in that state. Being in the nature of personal indebtedness accruing March 1 of each year, they constitute a transitory cause of action, imposed in Indiana but enforcible outside of that state, like any other civil obligation *in personam*.

## Point VIII.

**The cases cited in the prevailing opinion of the Circuit Court of Appeals are all distinguishable or are mere decisions of courts of minor jurisdiction.**

*Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, (Tr., fols. 37, 39), involved a penalty statute only and, therefore, did not decide the present underlying question. An action of debt was commenced in the Supreme Court of the State of Wisconsin against a corporation of Louisiana, based upon a judgment recovered in a Wisconsin state court for a penalty incurred by the corporation in failing to file certain annual statements required by the Wisconsin statutes. Demurrer to the original jurisdiction of the Supreme Court was filed on the ground that the suit was one for the enforcement of a penalty or forfeiture, was a suit penal in its character and was not a "con-

troversy of a civil nature" within the meaning of these words in Section 687 of the Revised Statutes (p. 269). The holding of the court was that original jurisdiction of the Supreme Court of controversies between a state and a citizen of another state embraced controversies of a civil nature only within the meaning of the section referred to and that a suit to enforce a penalty was not such a controversy, regardless of the form of action provided for the recovery of such penalty in the state court.

*New York Trust Company* v. *Island Oil & Transport Corporation*, 11 Fed. (2d) 698 (Tr., fol. 37). Since this was a decision of the court which decided this case below, it may be unimportant whether the decision covered the present underlying question. It is submitted, however, that the decision did not cover the question at bar. An annual franchise tax was levied upon a Virginia corporation by the State of Virginia after such corporation had been placed in the hands of receivers appointed by the federal court in New York. After the receivers were appointed, Virginia continued to assess the franchise tax upon the *corporation*, exactly as it had done previously. The receivers asked the instruction of the court appointing them, as to whether or not they should pay the tax *for the year subsequent to their appointment, in priority to the claim of general creditors.*

At no time since the receivership had there been any assets of the company in Virginia. The receivers took the position that as a matter of "comity, equity and expediency" the taxes should be paid, because of the possibility that, if not paid, the company's charter might be revoked by the State of Virginia, which action would embarrass the receivers in the collection and distribution of the corporate assets. The District Court authorized the payment of the tax, and the creditors' committee appealed.

The Circuit Court of Appeals held that the tax might

properly be paid by the receivers, in their discretion. That was the extent to which the order of the District Court went and it was affirmed. Whether or not Virginia could demand the franchise tax as a matter of legal right was not before the court, and therefore could not be authoritatively decided.

The court's discussion of Virginia's legal right to demand the tax, being *dictum*, was based upon the grounds, (1) that no property of the corporation had ever been within the State of Virginia during the year for which the tax was assessed; (2) that the assets of the corporation had all been in the hands of the federal receivers in New York, where they were subject to the claims of general creditors and Virginia had acquired no preferential lien upon them as against unsecured creditors, for they had never been within the state; (3) that having no preferential lien against the assets in the hands of the receivers, Virginia had no authority to lay a tax against the receivers themselves, for they had never operated within that state, or to impose any lien whatever upon assets which had always been in the hands of said receivers in New York; (4) that the license tax imposed by Virginia against the corporation, after the receivers were appointed, did not attach as a matter of law to the foreign receivers.

That these were the grounds upon which the decision rested, and not the broad proposition that taxes of one state can never be enforced in another, is conclusively shown by the citation of *Franklin Trust Co.* v. *New Jersey*, 181 Fed. 769, 104 C. C. A. 629, which, Judge Hough states, covered the matter then before the federal court in New York. In the *Franklin Trust Co.* case, the franchise tax was clearly distinguished from an ordinary tax, and was regarded as "not a tax at all" but an arbitrary, obnoxious and discriminatory imposition upon a corpora-

tion without regard to the value of its property or its franchises, and in the nature of a license fee. The court in the *Franklin Trust Co.* case expressly excluded from consideration cases of ordinary taxes, by saying (p. 769):

> "The proposition as to what might be the status in this jurisdiction of a New Jersey tax levied upon property, under rules which exclude the idea of disproportion and arbitrary imposition, has no bearing whatever upon the question before us."

The cited case, as did the *New York Trust Company* case, involved a claim to a preference over all unsecured creditors of the insolvent corporation, and did not present the question whether the claim, as non-preferential, should be allowed. Particular stress was laid in the *Franklin Trust Co.* opinion (and inferentially in the *New York Trust Company* case) on the fact that the corporation was a mere shell; that it had no assets in the state of its creation during the year for which the franchise tax was levied; that it did no business there; and that foreign creditors, who dealt with it on the faith of its assets in their state, should not be postponed to the license fee assessed by the parent state against an insolvent concern. It was conceded that taxes accrued prior to the receivership might perhaps be proved and enforced in the federal proceedings, the court saying (p. 774): "If they (the license fees) had accrued before the bill now before us was filed, they might stand, perhaps, as a claim to be proved, either secured or unsecured."

That the *New York Trust Company* case was not intended to determine the question now before the court is further shown by its citation of *Holshouser Co.* v. *Copper Co.*, 138 N. C. 248, 50 S. E. 650, and of *Ballou* v. *United States, etc., Co.*, 67 N. J. Eq. 188, 59 Atl. 331. In the former, the question related solely to the right of pref-

erence of a foreign state over local creditors of an insolvent corporation chartered by the foreign state, but whose assets were being administered in the local state; the foreign state claiming priority of payment as to its annually assessed license fee. The court expressed itself as entirely willing to entertain the claim, but not to give it priority over domestic creditors. In the *Ballou* case, there were involved only state license fees which had accrued *after the corporation had been placed in receivership.* No general tax was considered.

*State of Iowa* v. *Slimmer,* 248 U. S. 115 (Tr. fol. 39), involved no question of taxation. The State of Iowa asked leave to file in the Supreme Court an original bill of complaint against the State of Minnesota and certain individuals to restrain the prosecution in Minnesota of probate proceedings upon the estate of a decedent who was alleged to have been a resident of Iowa. The motion was made with a view to collecting ultimately certain taxes which the State of Iowa alleged it was entitled to have assessed and levied against the property of decedent, but the tax liability was not in issue and the only question involved was whether the State of Iowa could restrain the prosecution of probate proceedings in Minnesota.

*Ashley* v. *Ryan,* 153 U. S. 436 (Tr. fol. 39), held only that a charge, under the laws of the State of Ohio, upon an interstate consolidated railroad corporation, of a percentage of its entire authorized capital stock, as a fee for filing its Articles of Consolidation in the office of the Secretary of State, is not a tax on interstate commerce and that its enforcement involves no attempt on the part of the state to extend its taxing power beyond the territorial limits. The court said at p. 440:

> "Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be

> viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction."

The above, which was stated only *arguendo* and not applied in the Ryan case, is unquestionable in legal principle, but as it concerns the imposition and not the collection of taxes has no bearing on the present case.

*Matter of Anita Bliss,* 121 Misc. (N. Y.) 773 (Tr. fol. 39), is a decision of the Surrogate's Court of New York County misconstruing, if the petitioner's theory as to that decision is correct, the decision in the *Harbeck* case, *infra.*

*Walker* v. *Treasurer,* 221 Mass. 600 (Tr. fol. 39), was an action brought by the administrator with the will annexed of a Massachusetts estate to determine the liability of the estate to the commonwealth for a succession tax in respect of certain property held in trust by a Maryland corporation, and, therefore, outside the jurisdiction. It involved the question of whether a tax could be levied upon property outside the jurisdiction and not the question of whether taxes could be collected by suit outside the jurisdiction.

*People* v. *Kellogg,* 268 Ill. 489 (Tr. fol. 39), also involved only the question as to whether taxes could be imposed upon property not subject to the jurisdiction. This case held that real estate in Ohio was not subject to an Illinois inheritance tax as it did not descend by virtue of the laws of Illinois.

*State of Colorado* v. *Harbeck,* 232 N. Y. 71 (Tr. fol. 37, 38), is the case upon which the respondents have insisted most strongly throughout this litigation. The indulgence

of the Court is therefore asked for the following lengthy but necessary discussion of that case.

*The Harbeck case was decided on a point of constitutional law.*

The Court of Appeals of New York stated the question for decision as follows:

> "The question is whether the inheritance tax of Colorado may, *consistently with the due process clause of the United States Constitution,* be collected extraterritorially, by suit against the beneficiaries." (Italics ours.)

The facts were as follows: The State of Colorado sought to recover a Colorado inheritance tax against defendants, who were distributees of a decedent's estate, the will having been probated in New York. The executrix had been discharged and the estate settled two years prior to the commencement of the action. The inheritance tax had, of course, never been an obligation of the decedent during his lifetime but became operative, if at all, only at his death. The tax was assessed with reference to the transfer of stocks, bonds, etc., which had at all times been deposited and held in New York. No proceedings were taken for the assessment of the tax until after the executrix had accounted and the estate been distributed in New York. The Colorado statute provided that the tax should be a lien upon the property transferred until paid and that all legatees and executors should be liable for such taxes until the same had been paid. Neither the property nor the defendants, however, were within the State of Colorado or subject to the jurisdiction of that state.

The trial court based its decision in favor of the defendants upon the fact that the inheritance tax sought

to be recovered was not a debt and consequently was not founded upon a contract express or implied upon which a suit might be predicated, and upon the further ground that the plaintiff had not alleged and proved that it had a right under the Colorado law to institute the suit (106 Misc. 319).

The Appellate Division of the Supreme Court unanimously reversed the court below and held that the action could be maintained (189 App. Div. 865). *Inter alia,* it was there said (p. 875):

> "There is nothing to prevent a state, a political corporation, from seeking in the courts the relief or redress that any other corporation may demand (*Delafield* v. *State of Illinois,* 2 Hill 159). * * *
>
> "The remedy sought by the plaintiff is not limited to its courts and adequate enforcement can be had in ours (*Howarth* v. *Angle,* 162 N. Y. 179; *Shipman* v. *Treadwell,* 200 *id.* 472).
>
> "Public policy does not prohibit the assumption of jurisdiction by this court and the principle of comity demands it. (*Loucks* v. *Standard Oil Company,* 224 N. Y. 99.) The Inheritance Tax Law of Colorado has precisely the same design as a similar law in this state, and may indeed be said to be identical in its general provisions and scope. It was apparently to avoid the full force of the provisions of our own law that the defendants placed the decedent in the position of a non-resident of this state. As was said in the Loucks case: 'A foreign statute is not a law in this state, but it gives rise to an obligation, which, if transitory, follows the person and may be enforced wherever the person may be found. * * *.' 'No law can exist as such except the law of the land;

> but * * * it is a principle of every civilized law that vested rights shall be protected.' * * * The plaintiff owns something, and we help him to get it. * * * We do this unless some sound reason of public policy makes it unwise for us to lend our aid.'"

This unanimous reversal of the trial court was in accord with the expressed trend of the New York Court of Appeals to extend the rule of comity between the states, as illustrated in the case of *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99. Judge Cardozo there said (p. 113):

> "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union (*Walsh* v. *N. Y. & N. E. R. R. Co.*, 160 Mass. 571, 573; *Walsh* v. *B. & M. R. R.*, 201 Mass. 527, 533; Beach, Uniform Interstate Enforcement of Vested Rights, 27 Yale Law Journal 656). There is a growing conviction that only exceptional circumstances should lead one of the states to refuse to enforce a right acquired in another. The evidences of this tendency are many."

This principle was stated in an earlier case (*Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183, 194) as follows:

> "The reasons for extending the rule of comity between the States is constantly increasing. It should when practicable be extended, but not curtailed."

In spite of these declarations, the Court of Appeals reversed the Appellate Division, upon the ground that

enforcement of the alleged liability by the action then at bar would contravene the due process clause of the constitution.

The Circuit Court of Appeals cites the *Harbeck* case for the general proposition of non-enforceability of tax obligations accruing under the laws of another state. This, we submit, is an entirely erroneous and unjustifiable interpretation and application of the decision. The entire *Harbeck* opinion is predicated upon the premise that by reason of the absence of the persons and property from Colorado, no tax liability had accrued, and from this premise the conclusion inevitably followed that to allow a recovery would be to enforce, extraterritorially, the tax act as such. The court held that the proper steps to fix liability had not been taken, and that liability could not be fixed in Colorado because of lack of jurisdiction over the persons and property involved. To allow a recovery under such circumstances would be tantamount to an extraterritorial *imposition* of the tax, a result obviously prohibited by the due process clause. A judgment based upon liability validly imposed within the taxing state would involve entirely different legal consequences. Such a judgment would not constitute an extraterritorial imposition of liability, nor the extraterritorial enforcement of the tax act as such, but would be merely the enforcement of a transitory obligation which follows the person. Such enforcement of obligation outside the originating state, which is most common, is constitutionally unobjectionable.

Some of the language of this decision appears, apart from its context, to advance the general proposition of non-enforcibility of tax liability outside the taxing state, even though liability had been imposed within that state. Analyzed with the context, it is clear that such language is directed only to the question of extraterritorial enforce-

ment of a tax act as such, and not to the enforcement of liability accrued thereunder. This conclusion is greatly strengthened by the fact that no single authority cited in the *Harbeck* decision deals with extraterritorial collection, or goes further than to negate the right to *impose* tax liability extraterritorially.

Therefore, as the valid accrual of tax liability in the case at bar is indubitable, the *Harbeck* case is not in point, nor are the principles therein enunciated applicable. Although onerous, it is necessary, for a proper understanding of the *Harbeck* decision to examine its entire line of reasoning. The several points discussed are logically related; each point is considered in the light of the fact stated in the opinion (p. 80) that the property was not present in Colorado and that the defendants were non-residents, and is directed to the constitutional question stated.

The first point made was that, as the statute made no provision for collection by action, no action would lie, even though the statutory method of collection were unavailable; that no substitute for the statutory method of collecting taxes, as such method is expressed or fairly implied, may be invoked *either in the State of Colorado or elsewhere* (p. 81). It may be noted that Judge Crane concurred upon the sole ground that he could find no authority in the Colorado tax law for the action (p. 85). This point does not concern extraterritorial collection except incidentally, the decision being that collection by suit was unavailable even in Colorado. Nor has it any application to the case at bar, since the present action is explicitly directed and authorized by statute. It may be noted, however, that the Indiana decisions uphold the right of action without explicit statutory authorization, in which the federal decisions, contrary to the New York decisions, concur.

Some tax acts contemplate collection by statutory methods only, and not by suit, and many suits brought under such acts have been dismissed. This, however, does not concern a suit explicitly authorized by statute.

The court then held that the suit could not be maintained as an action upon an implied contract, arising from the acceptance of a legacy under the will of a resident of Colorado (p. 81). The argument of the court, summarized, was that taxes are non-contractual in nature, enforcement of revenue laws resting not on consent, but on force and authority; and that "No personal liability *based upon the receipt of a legacy* arises except under the provisions of the Colorado statute (§1) that the person to whom the property is transferred shall be personally liable for the tax until its payment *and that liability is purely local and statutory.*" (Italics ours.) The discussion of this point did not concern enforcement, but the question was whether the receipt by legatees who were beyond and not subject to the jurisdiction of Colorado, of a legacy consisting of property which was in the contemplation of the court outside the jurisdiction of Colorado, created a quasi-contractual obligation. The conclusion was reached that the acceptance by persons outside the State of Colorado of property outside the State of Colorado created no liability under a statute which could impose liability only locally within the State of Colorado. (It may be noted that the federal rule does not accord with the theory stated as to the nature of tax liability. See Point VI. And that the court was in error in holding that the property was outside the jurisdiction, under the decision in *Blodgett* v. *Silberman*, 277 U. S. 1, *infra*, page 70. In the case at bar there is no question of quasi-contractual obligation. Breed's tax liability arose not from any acts performed by him, his executors or legatees, either in the State of Indiana or elsewhere, but by

a direct operation of the Indiana statute upon a resident of that state in respect to property within the jurisdiction.

The court then held that the above-stated implied promise theory was fallacious, for the further reason that Colorado had acquired no control either of the property of the estate or of its owners, the executrix having paid the legacies by virtue of the authority vested in her on the probate of the will by the state of New York without invoking any privilege or sanction conferred upon her by the State of Colorado (p. 82). This point, which also concerns taxability and not collection, has no bearing on the instant case since Indiana had jurisdiction both of Breed and of his property.

The court then held (p. 83):

> "Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction, so that no personal liability or enforceable duty may be established as against them and where the property involved is without the taxing state so that no *res* exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue."

Under the circumstances stated, *i. e.*, where by reason of the absence of both person and property from the state neither can be taxed, the state is powerless to collect, either at home or abroad. The helplessness in the matter of remedy results from the inability to tax—the inability to impose personal obligation upon persons absent

from the jurisdiction, or to impose a lien upon property absent therefrom. This point goes to the original establishment of existing liability, and is inapplicable to a case like the present where liability is imposed upon a resident in respect to property within the state. It should also be noted that the authorities cited at this point deal solely with the question of the imposition of liability and not with the question of collection.

The court then held that the rule *mobilia sequuntur personam* did not apply and that the tangible *res* was at all times in New York and not Colorado, and that, therefore, the State of Colorado had no enforceable lien thereon by virtue of the taxing order (p. 83). The application of the rule *mobilia sequuntur personam* is of the utmost importance in the present litigation. If the rule applies in case of an inheritance tax, it certainly applies in the case of a personal property tax. The refusal of the Court of Appeals to apply the rule in the case of an inheritance tax was erroneous. This Court has since, in the case of *Blodgett* v. *Silberman* (*infra*, page 70), upheld a Connecticut inheritance tax act upon a state of facts identical in all material particulars to those presented in the *Harbeck* case, holding that for the purpose of liability under an inheritance tax act the rule should be applied.

The next point made by the court is that the steps provided by the Colorado statute for the fixing of personal liability had not been carried out (p. 84). In the instant case, the Indiana statutes have been complied with in all particulars.

The court then makes its final point. At page 85 it is said:

> "But it is urged that the right of the State of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective,

> is upheld by its local laws (*Pinnacle G. M. Co.* v. *People*, 58 Col. 86); that the Colorado statute provides that the attorney-general may collect the tax in 'any other manner as may be provided in this act or *by law*' (Act of 1916, Sec. 13), *i. e.*, by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Marshall* v. *Sherman*, 148 N. Y. *supra*, pp. 24-26; *Louckes* v. *Standard Oil Co.*, *supra*, p. 102; *Walker* v. *Treasurer, etc.*, 221 Mass. 600; *City of New York* v. *McLean*, *supra*.)"

It is from this portion of the Harbeck decision, doubtless, that the Circuit Court of Appeals drew the conclusion that that case upheld the general proposition of non-enforcibility of tax liability outside the taxing state. But throughout the *Harbeck* opinion, the court has discussed the several points on the basis of the invalidity of the alleged liability, or failure to impose liability either on the persons or on the property. Certainly the court does not at this point, without warning and without calling attention thereto, change the entire basis of its discussion and its entire line of reasoning. This point is

predicated on the same facts as the previous points considered.

The principle is stated that one state is precluded from acting as collector of taxes for a sister state and from enforcing the penal and revenue laws *as such*. Although unsupported by citation of authority, we do not question this principle, if properly applied and limited, the limitation being contained in the words "*as such.*" These words limit the application of the principle to the enforcement of these laws *as laws* and exclude from such application the enforcement of consequences of the laws, namely, the duty to pay what the law of the taxing state had already imposed on persons and property subject to the jurisdiction.

Petitioner submits that it is established under Point VII hereof, that the extraterritorial imposition of obligation is a matter entirely distinct from the extraterritorial enforcement of such obligation and that the latter is subject to no constitutional objection.

A correct interpretation of the *Harbeck* decision therefore limits its application to cases where no tax liability had been otherwise validly imposed. If that decision, however, can be said to deny as a general proposition, extraterritorial enforcement of tax liability, even where the liability has been validly imposed, we believe that it is unsound and entirely unsupported by authority. It is above demonstrated that there is no constitutional objection to the maintenance of jurisdiction. The authorities cited deal only with the jurisdiction to impose tax liability on persons or property, and not with the collectability of liability when imposed, and do not in any way support, or even consider, the non-collectability of such liability. The *Harbeck* decision refused jurisdiction on strictly constitutional grounds. The question of comity did not come up for consideration, and there was

no pronouncement that comity would be denied on grounds of public policy. If the constitutional objection fails, the court below should have taken jurisdiction of the instant case, in the absence of a rule of public policy to the contrary. No such rule exists.

*Blodgett* v. *Silberman*, 227 U. S. 1, in adopting and applying the maxim *mobilia sequuntur personam* overrules the theory upon which the *Harbeck* case declared the inheritance tax invalid and thereby vitiates the conclusions reached in the *Harbeck* case. Since the *Harbeck* decision this Court has, in its decision in *Blodgett* v. *Silberman*, enunciated a theory as to the validity of inheritance taxation directly contrary to the holding in the *Harbeck* decision, thereby not only shattering confidence in the *Harbeck* case as an authority, but also entirely invalidating the conclusions reached. The *Blodgett* case establishes the rule *mobilia sequuntur personam* as applicable to inheritance taxation. The decision in the *Harbeck* case denies any *jurisdictional right* on the part of the domicile state to impose a succession tax with respect to stocks and bonds physically located in another state and repudiates the doctrine of "*mobilia sequuntur personam*," saying:

> "*Mobilia sequuntur personam* is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located." (p. 84.)

That this is the ground of the decision is clear from the following:

> "This state taxes the succession of personal property of non-residents according to the actual *situs* of the thing (*Matter of Romaine,* 127 N. Y. 80, 89), and our courts may not say that the assets of the estate are at the same time actually within and without the State of New York. *The tangible res was, therefore, at all times in New York, and not in Colorado.*" (Page 84.) (Italics ours.)

Again, the court held:

> "Colorado had acquired no control either *of the property of the Harbeck estate* or of its owners." (p. 82.) (Italics ours.)

And further:

> "Where the property involved is *without the taxing state* so that *no res exists upon which the taxing state may impose a lien,* the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenues. (p. 83.) (Italics ours.)

If the court in the *Harbeck* case had recognized this principle, there is nothing in the opinion to indicate that access to its courts would have been denied to collect a valid tax.

The following cases are commented on for the reason that they are cited in the opinion of the District Court below, and in the *Harbeck* opinion:

*Pennoyer* v. *Neff,* 95 U. S. 714, (Tr. fol. 17), does not involve the application of the law of a foreign state. It arose in the Circuit Court of the United States for the District of Oregon. The plaintiff Neff sued the defendant Pennoyer for the recovery of a tract of land situated in

Multnomah County, Oregon, Neff claiming title under a United States patent and Pennoyer claiming title by virtue of a sheriff's sale under execution, sued out upon a judgment against Neff rendered by an Oregon state court. Neff was a non-resident of Oregon and had been served only by publication of the summons. It was held that substituted service by publication of process, instituting actions brought against non-residents, is effectual only where property within the state is brought under the control of the court and subjected to the jurisdiction by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein. The opinion states that since the adoption of the Fourteenth Amendment to the Federal Constitution the validity of the judgments of state courts may be directly questioned and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court had no jurisdiction do not constitute due process of law (p. 733). Except as to the general principle of the inability of a state court to impose liability upon persons outside and not subject to the state jurisdiction, the case is irrelevant to any of the issues in the present litigation.

*Parker* v. *Moore,* 115 Fed. 799, (Tr. fol. 37), held that the United States courts would follow the rules laid down by the highest court of a state in determining whether the *lex loci contractus* or the *lex fori* should govern, as to the interpretation of the contract and the morality of the claim, in the case of a claim under a contract which was alleged to be a gambling contract but which was enforceable under the laws of the State of New York, the state in which it was made and was to be performed.

*Maxwell* v. *Bugbee,* 250 U. S. 525, upholds the constitutionality of a New Jersey inheritance tax. The court conceded that consistently with the Federal Constitution a state may not tax property beyond its territorial jurisdiction, but held that the adoption, as a measure of tax, of the proportion which specified local property bears to the entire estate of decedent did not make the tax one upon property without the state (p. 539). It is only this concession that has any bearing on the *Harbeck* case. *Maxwell* v. *Bugbee* does not deal with or consider the question of extraterritorial collection.

*Dewey* v. *Des Moines,* 173 U. S. 193, holds that no personal liability can be imposed by assessment for local improvements against a non-resident owner of real estate who had received no notice of assessment.

*City of New York* v. *McLean,* 170 N. Y. 374, holds that the legislature had no power to impose upon a non-resident a personal liability for the payment of a tax assessed upon shares of national bank stock. The court distinguishes between the jurisdiction of the court over the person of the defendant in the action brought to enforce the alleged personal liability and the question whether any personal liability arose by imposition of the tax (p. 383).

*Matter of Maltbie* v. *Lobsitz Mills Co.,* 223 N. Y. 227, holds that the tax assessed upon the capital of a New Jersey corporation invested in its business in the City of New York imposed upon a foreign corporation no personal liability which could be made the basis of supplementary proceedings when the tax was returned uncollected.

*Marshall* v. *Sherman,* 148 N. Y. 9, was a stockholder's liability action. Merely as illustrative of laws having no effect in New York, the court said (p. 25), without citation of authority:

> "It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another."

In respondent's brief, in opposition to petition for writ of certiorari, the following cases were cited:

*State of Maryland* v. *Turner*, 75 Misc. 9. This was a mere trial term decision of the New York Supreme Court. The court said: "I do not find any case where such an action has been brought, so that the questions here presented are not only most interesting, but absolutely novel."

*State of Arkansas* v. *Bowen*, 20 D. C. Reports, 291. This was a penalty case.

*Henry* v. *Sargent*, 13 N. H. 321, 332, contains a dictum supporting respondent's contention, but the case was for false imprisonment and no enforcement of a revenue law was involved. This case was referred to in the Columbia Law Review discussion, *supra*, page 24.

*Heine* v. *The Levee Commissioners*, 86 U. S. (19 Wall.) 655, concerns no question of extraterritorial collection but merely the question of whether a court of equity would exercise the power to levy and collect taxes.

*Rees* v. *City of Watertown*, 86 U. S. (19 Wall.) 107, held only that the federal courts sitting in equity did not possess power to appoint a marshal to levy and collect a tax.

As against these decisions, the following may be cited, wherein courts recognized and enforced tax liabilities existing in other states:

*Holshouser* v. *Copper Co.*, 138 N. C. 248, 50 S. E. 650.

*Pratt* v. *Dean*, 246 Mass. 300, 306;

*Goodrich* v. *Rochester Trust Co.*, 173 App. Div. (N. Y.) 577;

*Welch* v. *Treasurer*, 123 Mass. 87, 91, 97;

That the federal courts will cooperate with the states in the collection of taxes, has been held in

*Litchfield* v. *County of Webster,* 101 U. S. 773;
*Bernardino Co.* v. *Southern Pac. R. Co.,* 118 U. S. 417;
*In re Tyler,* 149 U. S. 164, 186-187;
*Dayton, Trustee,* v. *Stanard, Treas.,* 241 U. S. 588;
*Marshall* v. *New York,* 254 U. S. 380;
*Ladoux* v. *LaBee,* 83 Fed. 761, 764, 766-767;
*First National Bank* v. *Ewing,* 103 Fed. 168, 186-190;
*Midland Co.* v. *Douglas County,* 217 Fed. 358 (C. C. A. 8th Cir.);
*Coy* v. *Title Guarantee Co.,* 220 Fed. 93, 135 C. C. A. 658;
*Spencer* v. *Babylon R. Co.,* 233 Fed. 803, 804, 807;
*Bear River Co.* v. *Petoskey,* 241 Fed. 53, 57, (C. C. A. 6th Cir.);
*Union Trust Co.* v. *Great Eastern Co.,* 248 Fed. 46, 47, 50, (C. C. A. 5th Cir.);
*Georgia* v. *Atlantic R. R. Co.,* 3 Woods 434.

## CONCLUSION.

**The judgment of the Circuit Court of Appeals should be reversed.**

Richard Edwards Breed resided for a number of years in Grant County, Indiana. He was, during all that time, the owner of a large amount of intangible personal property subject to taxation. In violation of the laws of the State of Indiana, Breed made no return of his said property for taxation. In consequence, he paid no taxes on said property either in the State of Indiana or elsewhere. Nevertheless, under the Indiana statutes, an obligation for personal property taxes accrued against Breed in each year as a personal obligation. The amount of such taxes has been fixed by assessment as provided by the Indiana statutes, but such assessment was not a condition precedent to the accrual of the tax obligation. These taxes have never been paid. Petitioner is specifically authorized by a statute of Indiana to maintain the present action.

The money involved, amounting to almost a million dollars, is of great importance to Grant County and to the municipal subdivisions thereof. It is also of the utmost importance to states and other municipal corporations to be able to collect their revenues. It would be seriously detrimental to the vital interests of the states and other municipal corporations if citizens could escape payment of taxes by the mere expedient of removal from the state, even though they might be fraudulently delinquent in their tax obligations, or if estates of tax delinquents could escape taxation merely by probate in some state other than the state of domicile. If municipal corporations are limited in their effort to enforce tax obligations to such efforts as they may make within the state borders, the power to collect revenues essential to the existence

and proper functioning of the states and their subdivisions will be seriously crippled. They are so limited unless suit may be maintained beyond the territorial limits of the taxing state.

The Circuit Court of Appeals has held that the District Court for the Southern District of New York has no jurisdiction to entertain the present action on the ground that revenue laws, as well as criminal and penal laws, are without force beyond the enacting state. The prevailing opinion makes no distinction between revenue laws and penal statutes and bases its opinion upon citations of decisions under the latter. Judge Learned Hand in his concurring opinion recognizes the distinction but holds the revenue laws fall within the same reasoning as criminal and penal statutes. But revenue laws are utterly different from criminal and penal statutes and do not fall within the same reasoning. A suit for the recovery of tax obligations which have accrued as personal obligations of a resident of a state during the time of his residence are mere suits for money judgments and do not in any way concern provisions for the public order of a state and cannot violate domestic public policy. Actions on such obligations are transitory actions of a civil nature such as, in the absence of a public policy to the contrary, may be enforced wherever the person liable is found. The statutes under which they arose are ordinary personal property tax statutes. The view taken by the federal courts as to the personal nature of tax liability is entirely in harmony with the view taken in the statutes and by the courts of Indiana. There can be no public policy hostile to the jurisdiction. Since the reasons on which is founded the exception that criminal and penal laws will not be enforced in another state do not apply to civil obligations under revenue acts, the exception should not

be extended to revenue acts. The District Court should have assumed jurisdiction of the cause of action.

The judgment of the Circuit Court of Appeals should, therefore, be reversed.

RUSSELL H. ROBBINS,
*Counsel for Petitioner.*

HENRY M. DOWLING,
*Of Counsel.*

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CHARLES E. MORE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 79

HARRY C. MOORE, as Treasurer of Grant County, Indiana

*Petitioner*

*v.*

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased

*Respondents*

## REPLY BRIEF FOR PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RUSSELL H. ROBBINS
*Counsel for Petitioner*

HENRY M. DOWLING
*Of Counsel*

34,188

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# Supreme Court of the United States

OCTOBER TERM, 1929.

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No. 79.

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HARRY C. MOORE, as Treasurer of Grant County, Indiana,
*Petitioner,*

*v.*

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased,
*Respondents.*

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## REPLY BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## REPLYING ARGUMENT.

### POINT I.

**The authorities cited by the respondents are wholly insufficient to sustain their contentions.**

The American cases cited by the respondents are all discussed in the brief for the petitioner. The inadequacy

of the authority is patent upon a consideration of its nature. The authorities cited are the following:

Two penalty cases:

*Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265;
*State of Arkansas* v. *Bowen*, 20 D. of C. Rep. 291.

Three cases in which the question of extraterritorial enforcement was not involved:

*Ashley* v. *Ryan*, 153 U. S. 436, in which the question was purely extraterritorial imposition, not collection;
*Heine* v. *The Levee Commissioners*, 86 U. S. 655;
*Rees* v. *City of Watertown*, 86 U. S. 107.

A decision of the court whose decision is here for review, the pertinent portion of the opinion being dictum:

*New York Trust Company* v. *Island Oil & Transport Corporation*, 11 Fed. (2d) 698.

Two lower court decisions:

*Matter of Anita Bliss*, 121 Misc. 773;
*State of Maryland* v. *Turner*, 75 Misc. 9, in which the court stated that the questions presented were absolutely novel.

A false imprisonment case:

*Henry* v. *Sargeant*, 13 N. H. 321.

*State of Colorado* v. *Harbeck*, 232 N. Y. 71. Petitioner submits that the basis of this decision was that the tax was not validly imposed and that the decision is not logical otherwise. The decision was based upon a refusal of the court to apply the maxim *mobilia sequuntur personam*. As to the effect of *Blodgett* v. *Silberman*, 277 U. S. 1, upon the *Harbeck* decision, respondents make the point that the *Blodgett*

case did not deal at all with the problem of extraterritorial enforcement. This is unquestionable, but by its decision upon the maxim *mobilia sequuntur personam* this court has overturned the basis of the *Harbeck* decision. The conclusion to which the New York Court of Appeals would have come had it believed the tax to have been validly imposed is problematical. In the present case the *Blodgett* decision fixes the situs of the intangibles in respect of which the tax was levied.

The English cases cited by the respondents are the following:

*In re Visser* (1928), 1 Chan. 877. This case sustains the contention of the respondents but concedes that there is no direct previous authority except the case of *Municipal County of Sydney* v. *Bull.*

*Municipal County of Sydney* v. *Bull* [1909], 1 K. B. 7. The court was of the opinion that action could not be brought in one country to enforce the revenue laws of another country, but calls attention to the fact that the exact decision was that it was not the intent of the Australian statute, which authorized collection by suit, to authorize collection beyond the confines of the Colony, coupled with the fact that the action in question was a mixed action and therefore not transitory in nature.

*The Attorney-General for Canada* v. *William Schulze, & Co.*, 9 Scots Law Times Reports 4 (1901). This was a penalty action.

*City of Regina* v. *McVey*, 23 Ont. W. N. 32 (1922), is decided solely upon the authority of *Municipal County of Sydney* v. *Bull* without discussing the question involved.

The quotation in the respondent's brief constitutes the whole of the opinion.

*Holman* v. *Johnson*, 1 Cowper 341 (1775), was assumpsit for goods, sold and delivered in Holland, the seller knowing that the goods were to be smuggled into England, but having no connection with the smuggling except such knowledge. The decision was that the plaintiff's demand was not founded upon the ground of any immoral act or contract, and therefore was enforcible. The only question was whether the laws of Holland vitiated the contract. No question of extraterritorial enforcement arose or was considered.

*The Emperor of Austria* v. *Day and Kossuth* (1861), 3 De Gex, Fisher and Jones' Reports, 217, 241-242, was an appeal from a decree restraining the defendants from making notes purporting to be the notes of the Hungarian state. The case is absolutely dissimilar from the present case and the principles of the decision are entirely inapplicable. It is interesting to note that in the portion of the opinion referred to by the respondents the court said:

> "But, although from the comity of nations, the rule has been to pay respect to the laws of foreign countries, yet *for the general benefit of free trade*, 'revenue laws' have always been made the exception." (Italics ours.)

*Huntington* v. *Attrill* [1893], A. C. 150, was an action under a statute which the court construed as penal, a New York statute making officers of corporations who signed false certificates liable for debts of the corporation.

*Cotton* v. *Rex L. R.*, L. R. 1914, A. C. 176, held that the Quebec Succession Duties Act upon its true construction imposed no duty upon the transmission of movable property outside the Province—the decision being one of statu-

tory construction and involving only the question of imposition of duties on property outside the taxing jurisdiction, not the question of extraterritorial collection. The action was initiated in Quebec.

*Indian & General Investment Trust, Ltd.* v. *Borax Consolidated, Ltd.* [1920], 1 K. B. 539, 550. In this case the Tonopah & Tidewater Railroad Company, an American railroad corporation, undertook to pay interest on its bonds in London, the deed of trust providing that it should be construed and the rights of all parties thereunder regulated by the laws of England. The Railroad Company in making interest payment claimed to deduct the United States income tax. It was held that payment of such a deduction was not a discharge of the company's obligation. No question of the jurisdiction of the court or of the rights of the United States Government was involved.

In *The King of the Hellenes* v. *Bostrom*, The Law Journal, July 14, 1923, at page 306, the Greek Government claimed, by reason of certain legislation and executive decree, a certain cargo shipped from Greece. The court found that the Greek Government had no proprietary rights in the cargo, but that the legislative machinery gave the government part of the profits resulting from payment in foreign coin for the goods exported. The reporter says:

> "He (Mr. Justice ROWLATT) could not give the Greek Government a lien on the goods to enable them to levy the tax. The rights of the parties in respect of the proceeds of the goods is another question, and that apparently is still left open as a matter for further determination."

These authorities are totally inadequate to support such an important exception to the general rules of law and comity as that here claimed in behalf of the respondents.

## POINT II.

### There is no good reason why claims under revenue laws should not be enforced outside the taxing jurisdiction.

The respondents have introduced a triangle [Brief, Point I(c), p. 24] which appellant does not believe exists. Conceding, for the argument, that the *Harbeck* case would be controlling in the courts of the State of New York in the case of a tax validly imposed, the petitioner understands the decision in that case to go no further, at least, than to hold that the courts of the State of New York are not open for the enforcement of tax claims arising in other jurisdictions. No state policy of the State of New York closing the federal courts to such causes of action can exist. Whether or not the taxing statute is valid, and whether or not the procedure followed for assessment resulted in a valid assessment, are questions of law and not of policy. And the question of whether a resident of New York, or an estate being administered in the New York courts, should pay taxes justly due to another state or its municipal subdivisions, is not a question of the domestic economy of the State of New York but is entirely a private matter.

The examination referred to on page 24 of respondents' brief would create no difficulty or embarrassment. Always, where the cause of action arises under the laws of another jurisdiction, it is necessary to determine whether the law which gives rise to such cause of action

is valid, whether the facts of the particular case bring it within the purview of that law, and whether such cause of action runs counter to the settled public policy of the trial jurisdiction. The objections raised by the respondents could be urged with equal force in an action to recover damages for personal injuries suffered in another State. The courts have shown no disposition to shirk the necessary inquiry. But, as stated by Judge LEARNED HAND, the inquiry "is not a troublesome or delicate inquiry where the question arises between private persons." The only inquiry in the case at bar on the point of policy would be whether the cause of action conflicted with some settled policy of the national government. The State of New York is not concerned. A policy of the state, closing its courts in a similar case, would be wholly immaterial. The necessity for the classification suggested by respondents is not apparent. Taxation certainly meets with the approval of the federal government. The federal courts have expressed no disapproval, so far as the petitioner is aware, of any particular form of taxation in force in any of the states, so long as such taxation is within constitutional limits. It is unnecessary that the federal government shall have adopted a tax of the particular form under which the asserted obligation arises. It is only necessary that the cause of action shall not "run counter to the 'settled public policy' " of the federal government. Therefore, the inquiry, where enforcement is sought of an obligation arising under the revenue laws of another jurisdiction, is simple, and is neither troublesome nor delicate.

The difficulties foreseen by Judge LEARNED HAND are advanced by him as original ideas in respect of the exception claimed to the general rule of law. They have no

support in previous decisions. The cases cited in the respondents' brief are all based upon supposed prior authority, or on reasons entirely different from those now urged in support of the alleged exception, such as "the general benefit of free trade." The reasons now urged and asserted for the first time in the case at bar are wholly insufficient to support the alleged exception.

If such unfortunate difficulties in determining whether or not to pay valid taxes should arise, as set forth on page 26 of the respondents' brief, such difficulties would be entirely the result of tax evasion. Had the decedent discharged his valid tax obligations there would be no questions for representatives of his estate to solve. Is there any hardship in passing on to one's personal representatives the question, which the decedent had to solve in his lifetime, of whether or not to pay the taxes which had accrued against him? The flood of actions threatened on page 25 of the respondents' brief but emphasizes the necessity for relief. If successful tax evasion is so prevalent as there intimated, should there be no relief? Relief, not from negligence on the part of the tax officials (despite the allegation of lack of diligence on page 25 of the respondents' brief, the complaint alleges that prior to Breed's death the tax officials had no knowledge of the facts on which the tax obligation is based), but relief against tax evasion which, except for such relief as is here demanded, will be entirely successful.

## CONCLUSION.

The authorities furnish no sufficient support for the exception to the general rule of law here contended for, nor do the reasons advanced furnish any satisfactory basis for such exception. Satisfactory previous authority being lacking, it is open to this Court, unhampered by authority, to pronounce and establish the rule of law which it deems proper. Petitioner urges and submits that municipal corporations having just and valid claims under revenue laws should be afforded a method of collecting their revenues. The doors should not be closed in their faces for the benefit of tax evaders.

**The judgment of the Circuit Court of Appeals should be reversed.**

Respectfully submitted,

RUSSELL H. ROBBINS,
Counsel for Petitioner.

H. M. DOWLING,
Of Counsel.

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FILED
MAY 25 1928
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 879.

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA,
*Petitioner,*

*against*

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS (SUED AS NEIL A. WEATHERS), AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GRAHAM SUMNER,
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LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
on the brief.

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# Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 879.

HARRY C. MOORE, as Treasurer of Grant County, Indiana,
Petitioner,

AGAINST

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as Neil A. Weathers), as Executors of the Last Will and Testament of Richard Edwards Breed, deceased,
Respondents.

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Statement.

The petitioner seeks a review by this Court of the decision by the United States Circuit Court of Appeals for the Second Circuit, affirming an order of the District Court of the United States for the Southern District of New York

granting a motion made by the respondents to dismiss the complaint herein upon the ground that the complaint did not state a cause of action of which the Court would take jurisdiction (Tr. fol. 71). Opinions were rendered by Judge Knox in the District Court (Tr. fols. 73-81), and by the Circuit Court of Appeals (Tr. pp. 35-41).

The action was brought by the plaintiff as Treasurer of Grant County, Indiana, to recover the sum of $982,516.22, with interest, against the defendants as executors of the Last Will and Testament of Richard Edwards Breed, deceased, for personal taxes for the years 1903 to 1926, inclusive, alleged to have been assessed against the decedent after his death as a resident of Grant County, Indiana, by the taxing authorities of said County (Complaint, paragraphs VI and VII, Tr. fols. 32-47).

The District Court refused to act as a tax collector for the political subdivisions of Grant County, Indiana, and said in the course of its opinion:

> "As a result of what has been said, I do not conceive it to be the duty of this Court, notwithstanding the weight of insistence to the contrary, to undertake the enforcement within the State of New York, of the revenue laws of Indiana." (Tr. fol. 80.)

In the opinion of Judge Manton in the Circuit Court of Appeals, concurred in by Judge Augustus N. Hand, which affirmed the order of the District Court, it was said:

> "With the appellees and the property without the state, and the estate being administered in New York, the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclude one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution, limited to persons and property within its jurisdiction. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265." (Tr. p. 37.)

Judge Learned Hand, in a concurring opinion, said:

> "To pass upon the provisions for the public order of another State is, or at any rate, should be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they effect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." (Tr. p. 41.)

The narrow question presented in this case in its present form is whether or not the attempt by the taxing authorities of Grant County, Indiana, to impose and assess taxes after the death of the decedent, where neither the respondents nor the assets of the decedent's estate were within the State of Indiana, created a liability which the Federal Court sitting in New York should and could enforce.

All of the decisions in which the question has been involved hold that the collection of taxes must be made within the territorial jurisdiction of the taxing sovereign, and the brief of the petitioner contains no cases in any court holding the contrary or which hold expressly or by necessary implication that the revenue laws of one state may be enforced in another jurisdiction. The reason for this absence of authority in support of petitioner's contention is suggested by Judge Knox in his opinion in the District Court, where he said:

> "There is, however, another consideration which strengthens my belief that the complaint should be dismissed. It is that plaintiff has not called attention to a single authoritative decision which, under circumstances such as are revealed by the present pleading, permitted the tax collecting officer of a political subdivision of one State, or the revenue authorities of such State, to go within the borders of another, and there

collect taxes from property that never was within the jurisdiction where the assessment was made, or from persons who were non-residents of the sovereignty which authorized such assessment. The inability of the plaintiff to point to some substantial authority in support of the proposition which he urged at the bar, and in his brief is due, I think, to the fact, as declared by the State Court of Appeals in the Harbeck case, that private international law

> 'precludes one State from acting as a collector of taxes for a sister State and from enforcing its penal or revenue laws as such',

it being

> 'universally recognized that the revenue laws of one State have no force in another'.

See *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, and *New York Trust Co.* v. *Island Oil & Transport Corp.*, 11 Fed. (2d) 698." (Tr. fols. 77-80.)

The petition and brief upon this application contain no sufficient reason for granting a review by this Court of the decision of the Circuit Court of Appeals. The decision of the Circuit Court of Appeals was in accordance with all of the authorities which have considered the question of extraterritorial collection of revenue, and those authorities are plainly based upon sound principles of private international law and public policy. The decision is not in any sense a decision on a question of federal law as contended by the petitioner and even if it were, the question has been authoritatively and properly settled in the higher federal courts. There is, therefore, no necessity for a review by this Court for the purpose of settling the question. The authorities are discussed under Point II of this brief.

It appears from the complaint (paragraph I, Tr. fols. 15-17) that the plaintiff is the Treasurer of Grant County, Indiana, and a citizen of Indiana, and that the defendant Sidney Z. Mitchell is a citizen of New York, and that the defendant Niel A. Weathers is a citizen of New Jersey. It

also appears from the complaint (paragraph III, Tr. fols. 18-19) that the defendants are not sued in their individual capacities, but as executors of the Last Will and Testament of Richard Edwards Breed, deceased, and that the defendants were qualified and appointed as such executors by the Surrogates' Court of the County of New York. The complaint does not allege that any of the decedent's property, referred to in paragraph IV (Tr. fols. 23-27), was ever physically within the State of Indiana, and similarly the complaint does not allege that the defendants were ever personally within the State of Indiana or that the decedent died there. The complaint alleges two causes of action, the first of which is based upon an alleged indebtedness of the decedent and the defendants as executors to Grant County, Indiana, and its political sub-divisions, for the taxes alleged to have been assessed against the decedent after his death, and the second of which is based upon an alleged unjust enrichment of the decedent and the defendants as executors by reason of the failure to pay such taxes. The complaint does not allege that any lien was imposed upon any of the property of the decedent by reason of any of the proceedings for the assessment of the taxes which are referred to in the complaint, or otherwise, and the plaintiff's effort is simply to enforce in this jurisdiction, against the defendants as executors, an alleged personal liability of the decedent for taxes which was not liquidated until after his death.

With reference to the concern expressed by the petitioner that the amount in controversy be paid to Grant County, it may be noted that the statute which purports to authorize the plaintiff to maintain this action, appearing in paragraph IX of the complaint (Tr. fol. 56), contains a provision for his compensation which is not set forth in the complaint. This statute, Indiana Session Laws of 1927, chapter 54, page 141, Section 1, contains the following provision:

> "* * * said treasurer, in his name as such officer, may, or whenever requested so to do by the board of county commissioners, shall, at any time after delin-

quency, institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the said delinquent taxes, or a substantial part thereof, can be collected in this or any other state by such suit or proceedings, *and for his services in so doing the said treasurer shall charge and receive twenty-five per centum of such money so collected:* * * *." (Italics ours.)

The respondents are executors of an estate which is in the process of administration in the Surrogates' Court of New York County and derive their powers from that Court. In that Court they would not be free to pay the petitioner's claim and they would not be required to pay the same because the Court of Appeals and the Surrogates' Court have held, in *State of Colorado* v. *Harbeck, infra*, and *Matter of Anita Bliss, infra*, respectively, that taxes due to another state cannot be collected in New York State and are not debts. It seems entirely proper, in the circumstances, that the Federal Court should refuse to take jurisdiction of the petitioner's complaint.

## POINT I.

**The action is brought to enforce a revenue law of the State of Indiana.**

The District Court concluded that this was an action to recover taxes alleged to be due to the political sub-divisions of Grant County, Indiana. The Circuit Court of Appeals adopted this view. It appears from the complaint that both causes of action alleged therein are based upon the failure of the decedent and the respondents as executors of his estate to pay taxes alleged to be due to various political sub-divisions of the State of Indiana for the years 1903 to 1926, inclusive, assessed against the decedent after his death. None of the Indiana statutes pleaded in the complaint describes taxes as debts. In fact the only statute pleaded in the complaint, from which the petitioner claims the right to maintain the present action (Statutes of Indiana, 1927, Chapter 54, page 141, Section 1; Tr. fols. 56-57), contains the following provision:

> "* * * said treasurer, in his name as such officer, * * * shall * * * institute and prosecute to final judgment and execution, all suits and proceedings necessary *for the collection of delinquent taxes* owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the *said delinquent taxes*, * * * can be collected in this or any other state by such suit or proceedings * * *." (Italics ours.)

The petitioner attempts to maintain the present suit under the authority of that Section and that Section shows beyond any doubt that the action which that Section attempts to empower the treasurer to maintain is an action to collect delinquent taxes and not any imaginary "debt" or "personal liability".

While the complaint describes the alleged liability of the respondents as an "indebtedness", this description cannot obscure the real nature of the alleged liability. As the opinion in this case of Judge Manton in the Circuit Court of Appeals, said:

> "Taxes are imposts, not debts, collected for the support of the government. *Meriweather* v. *Garrett*, 102 U. S. 472. The form of procedure to collect them cannot change their character. Any contractual or quasi contractual obligation to pay arises out of the assessment. The enforcement of revenue laws rests not on consent, but on force and authority. *State of Colorado* v. *Harbeck*, 232 N. Y. 71. An action for debt cannot be maintained to collect a tax in the New York State Courts. *City of New York* v. *McLean*, 170 N. Y. 374; *Matter of Maltbie* v. *Lobsitz Mills Co.*, 223 N. Y. 227. See also, *City of Boston* v. *Turner*, 201 Mass. 190" (Tr. pp. 36-37).

## POINT II.

**The revenue laws of Indiana should not be enforced outside of the State of Indiana and the District Court properly refused to act as tax collector for the political sub-divisions of that State.**

The plaintiff in this action seeks to obtain a judgment against the defendants as executors of the Last Will and Testament of Richard Edwards Breed, deceased, and to collect taxes alleged to be due to the plaintiff as Treasurer of Grant County, Indiana, out of the assets of the estate located in New York and subject to the jurisdiction of the Surrogates' Court of New York County, from which the defendants, as executors, received their authority to act. The complaint does not allege that any of the property of the decedent is or was, at any time, within the State of Indiana and in

paragraph IV of the complaint (Tr. fols. 19-28) it is alleged specifically that a substantial part of the property owned by the decedent during the years 1903 to 1926, inclusive, has come into the hands and under the control of the defendants as his executors "and the same is now held by them in the State of New York as part of the assets of his estate now in the course of administration" (Tr. fol. 28).

The plaintiff, therefore, is seeking to obtain a judgment for the collection of taxes due to political sub-divisions of the State of Indiana, although neither the defendants nor any of the property of the decedent is alleged to have been within that State at the time the tax was assessed and although the decedent, at that time, was dead. We submit that the employment of the Federal Court as a tax collector for one of the states, or the political sub-divisions thereof, is as repugnant to well settled principles of private international law as the collection of taxes due a state through the instrumentality of another state. Such was the conclusion of the District Court and the Circuit Court of Appeals in the present case.

Wherever the question has arisen, courts have held uniformly that taxes due to one sovereignty will not be enforced outside of the territorial jurisdiction of that sovereignty. While the question does not seem to have been passed upon squarely by this Court, this Court said, in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, at page 290:

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for *the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue*, or other municipal laws, and to all judgments, for such penalties." (Italics ours.)

In *Ashley* v. *Ryan*, 153 U. S. 436, this Court said, at page 440:

> "Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be viewed as a tax,

a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or *involved the assertion of the right of a State to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.*" (Italics ours.)

In *New York Trust Company* v. *Island Oil & Transport Corporation*, 11 F. (2d) 698, the Circuit Court of Appeals for the Second Circuit had occasion to pass upon a similar question. In that case the State of Virginia had assessed franchise taxes against a Virginia corporation for which receivers had been appointed by the District Court for the Southern District of New York. The receivers applied to the District Court for instructions as to whether or not they should pay the franchise taxes to the State of Virginia. Judge Knox authorized the payment of the taxes, and on appeal, the Circuit Court of Appeals affirmed the order, saying, at page 699:

"* * * if the receivers in the exercise of their business discretion deem it expedient to pay this tax, they are authorized so to do; but they are not required to do it, because the State of Virginia has no legal right to demand payment from them."

In discussing the question as to whether or not the State of Virginia was entitled to the taxes as a matter of law, the Circuit Court of Appeals said, at page 699:

"If, however, in this suit and in the State of New York, Virginia had appeared and demanded payment, we think it could not have recovered.

"Undoubtedly Virginia can go on taxing its own corporation as long as that corporation exists; but its right to recover against any property must rest either upon its sovereign power or upon statutes passed in pursuance thereof. But neither its sovereignty nor its statutes has any extraterritorial vigor."

The question has been passed upon squarely by the Court of Appeals of the State of New York in *State of Colorado* v.

*Harbeck,* 232 N. Y. 71. In that case the State of Colorado sought to recover an inheritance tax upon the estate of a resident of Boulder, Colorada, who had died in the City of New York. His will and codicils thereto were admitted to probate in the Surrogates' Court of New York County and letters testamentary thereunder were duly issued. Transfer tax proceedings were had in New York. No provision was made for the payment of a transfer tax to the State of Colorado. Thereafter, the State of Colorado attempted to assess taxes upon the estate as the estate of a resident of Colorado, and took the proceedings authorized by the Colorado statute. No part of the decedent's estate was physically present in Colorado at the time of his death or thereafter, and none of the defendants appeared in the Colorado proceedings or was a resident of Colorado. The Court of Appeals affirmed a judgment dismissing the complaint, and said, at page 83:

> "Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction, so that no personal liability or enforcible duty may be established as against them and where the property involved is without the taxing state so that no *res* exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue. (*Pennoyer* v. *Neff,* 95 U. S. 714; *Dewey* v. *Des Moines,* 173 U. S. 193; *City of New York* v. *McLean,* 170 N. Y. 374, 387, 388; *Matter of Maltbie* v. *Lobsitz Mills Co.,* 223 N. Y. 227.)
>
> "But plaintiff contends that by the application of a familiar fiction of law the legal situs of decedent's personal property attaches to his domicile in Colorado, although the property was in every reasonable sense within the state of New York, where the stocks, bonds and credits were kept, and that Colorado has an enforcible lien thereon by virtue of the taxing order. A suf-

ficient answer to this contention is that the judgment in suit imposes a personal liability only and enforces no lien. A further answer is that *mobilia sequuntur personam* is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located. (*Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 206; *People ex rel. Hoyt* v. *Commissioner of Taxes,* 23 N. Y. 224, 227; *Maxwell* v. *Bugbee, supra.*) This state taxes the succession of personal property of non-residents according to the actual situs of the thing (*Matter of Romaine,* 127 N. Y. 80, 89) and our courts may not say that the assets of the estate are at the same time actually within and without the state of New York. The tangible *res* was, therefore, at all times in New York and not in Colorado.

"If these general and well-recognized principles of taxation are by any process of reasoning to be considered inapplicable to the collection of transfer taxes, a sufficient answer to the contention of the state of Colorado remains. When a statutory method of enforcing the collection of a tax is provided which requires judicial action before the liability of the taxpayer is finally fixed it is exclusive and must be followed. That it cannot be followed does not alter the case. The order which was entered in Colorado in the proceeding to fix the tax on notice by mail to defendants did not terminate a suit or controversy between parties and is not a judgment either *in personam* or *in rem.* (*People* v. *Kellogg,* 268 Ill. 489.) After the tax has been assessed by the preliminary order no person can be compelled to pay it until a citation issued out of a Colorado court having jurisdiction has been regularly served on him and he has had an opportunity to be heard. Unless this notice is given, the constitutional right to due process of law is invaded. (*Matter of McPherson,* 104 N. Y. 306, 321.) The Colorado statute thus provides (§§ 18, 19) for a proceeding to collect the tax, subsequent to the assessment, on notice to the persons interested in the property, in the nature of an action *in rem.* 'A statutory remedy

or proceeding cannot be enlarged by construction nor be made available or valid except by strictly following the directions of the act.' (*Matter of Maltbie* v. *Lobsitz Mills Co., supra,* p. 232; *Oakman* v. *Small,* 282 Ill. 360.)

"But it is urged that the right of the state of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective, is upheld by its local laws (*Pinnacle G. M. Co.* v. *People,* 58 Col. 86); that the Colorado statute provides that the attorney-general may collect the tax in 'any other manner as may be provided in this act *or by law*' (Act of 1916, § 13). *i. e.,* by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction. (*Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Marshall* v. *Sherman,* 148 N. Y., *supra,* pp. 24-26; *Loucks* v. *Standard Oil Co., supra,* p. 102; *Walker* v. *Treasurer, etc.,* 221 Mass. 600; *City of New York* v. *McLean, supra.*)"

Attempt is made by the petitioner to distinguish the *Harbeck* case in Point VII of his argument in the brief in support of the petition for a writ of certiorari, on the ground that it involved an extraterritorial imposition of the tax, which petitioner concedes would be contrary to well-established principles of constitutional and international law, but the petitioner argues that this extraterritorial imposition of tax is to be distinguished from an extraterritorial enforcement of tax. This attempt to distinguish between extraterritorial imposition and enforcement is developed at length in Point V of petitioner's brief. No authority is cited for this distinction and certainly there is no distinction in this case if such distinction can validly be made in any case. In the

opinion of Judge Manton in the Circuit Court of Appeals, it was said, with reference to this attempted distinction:

> "The appellant's argument that the extraterritorial imposition of tax is to be distinguished from the extraterritorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national district court outside of the state to collect such tax" (Tr. p. 38).

This proceeding is repugnant to the same two principles stressed in the *Harbeck* case. The first of these is that under the due process clause of the United States Constitution, the State of Indiana had no jurisdiction to impose a tax because neither the defendants nor the property of the decedent, nor the decedent himself, were within the jurisdiction of the State of Indiana at the time the taxes were assessed. If they had been, the petitioner would not now be seeking the assistance of the United States courts outside of the State of Indiana. The other principle which bars this suit is the principle of private international law, as stated in the *Harbeck* case, which

> "* * * precludes one state from acting as collector of taxes for a sister state and from enforcing its penal or revenue laws as such."

The petitioner attempts in Point VII of his brief to impeach the authority of the *Harbeck* case. Without dwelling upon his analysis of that case at length, it is apparent that the only real difference between the cases is that in the *Harbeck* case the action was commenced in the New York State Court, while this action was commenced in the Fed-

eral Court sitting in New York, and that the action in the *Harbeck* case was to collect inheritance taxes, while this action is to collect personal property taxes. This difference in fact does not prevent the *Harbeck* case from being a square decision on the question by a court of high authority. At page 72 of the petitioner's brief the contention is made that the decision of this Court in *Blodgett* v. *Silberman,* 277 U. S. 1, overrules the *Harbeck* case. It is plain that this Court's decision in *Blodgett* v. *Silberman,* did not deal at all with the problem of extraterritorial enforcement of taxes. Referring to this contention with respect to the *Blodgett* case, the opinion of Judge Manton in the Circuit Court of Appeals states:

> "But it is said that *Blodgett* v. *Silverman,* 277 U. S. 1, overrules what is said in the *Harbeck* case. The *Blodgett* case did not deal with the question of extraterritorial enforcement of state tax statutes which is presented in this case. That case involved the question of whether the State of Connecticut could tax the transfer of certain intangible personal property under a will probated in Connecticut and collect the tax in a Connecticut court against executors appointed by the Connecticut Court of Probate. The deceased was domiciled in Connecticut at the time of his death. The court decided that intangible personalty has such a situs at the domicile of its owner and its transfer on his death may be taxed there. No question of jurisdiction of the State of Connecticut over the executors was presented. The decision in the *Blodgett* case was limited to upholding a transfer tax upon intangibles in a court which had jurisdiction to tax. That principle is recognized in the cases we have referred to.
>
> "Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogate's Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed is deter-

mined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a succession tax claimed, but a personal property tax. The application of the fiction of *mobilia sequuntur personam* would require an assessment during each of the years for which taxes are claimed, during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought." (Tr. pp. 38-39.)

The English courts have applied the same rule and have held that taxes due a colony are not to be collected outside of the colony. In *Municipal Council of Sydney* v. *Bull* (1909), 1 K. B. 7, an action was brought in England on behalf of the Municipal Council of the City of Sydney in the State of New South Wales, to collect the amount claimed from an owner of property in New South Wales for local improvements. The Court said, at page 12:

"Mr. Foote contends that this enactment enables an action to be brought in this country and makes the Courts of this country auxiliary to the Colonial Courts to this extent at all events, that whereas before the enactment this claim could not have been recovered by means of an action in the Colony, it is now recoverable not only there, but in this country also. Now, in my view, that was not the object or intention of the enactment. Its sole object and intention was to provide that within that area where the claim was recoverable it might be recovered by an action. It was urged that this is in its nature a transitory action. I do not think it is. Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes. But what restriction is to be imposed on such legislation if this claim could be put in suit in this country? It is true that the contribution which the Municipal Council of Sydney seeks to levy upon the defendant is a contribution in money, but it might be exacted in another form; the Colonial Legisla-

ture might have enacted that of those persons whose property had been improved one should plant trees, another should lay drains, and a third should sink wells and find water—provisions which under certain given circumstances might be as wise and equitable as the levy of a rate for contribution in money. Could the persons who omitted to perform these statutory obligations be sued in this country? Certainly not. And the mere fact that in New South Wales the contribution is a money contribution enforceable by action as well as by distress makes no difference. The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State."

The analogy between the proceeding in that case in a court of the Commonwealth sitting outside of the colony and the action in the present instance in a federal court sitting outside of Indiana, appears to be complete.

There are several other cases in the American courts where the question of extraterritorial enforcement of revenue laws has arisen and in these cases also the courts have without exception refused to permit extraterritorial enforcement of the revenue laws involved.

*Matter of Anita Bliss*, 121 Misc. 773 (New York County Surrogates' Court, 1923);

*State of Maryland* v. *Turner*, 75 Misc. 9 (New York Supreme Court, 1911);

*State of Arkansas* v. *Bowen*, 20 D. of C. Rep. 291 (District of Columbia Supreme Court, 1891).

See also:

*Henry* v. *Sargeant*, 13 N. H. 321, 332 (1843).

The petitioner claims that there is some basis for a distinction between criminal and penal laws on the one hand and revenue laws on the other, but the reason for the refusal to enforce all of such laws in another sovereignty is cogently

stated by Judge Learned Hand in his concurring opinion in the Circuit Court of Appeals in the present case:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in foreign States if they run counter to the 'settled public policy' of its own State. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate, should be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." (Tr. p. 41.)

In connection with the petitioner's effort to show that revenue laws should be treated for this purpose as fundamentally different from penal and criminal laws, the petitioner cites *Tennessee* v. *Whitworth*, 117 U. S. 129, *Supervisors* v. *Rogers*, 7 Wall. 175, and *In re Stutsman County*, 88 Fed. 337, but none of these cases lends any support to the petitioner's contentions. In *Tennessee* v. *Whitworth*, the suit was removed to the Federal Court on the ground that the suit was one arising under the Constitution of the United States and the question of jurisdiction does not appear to have been raised in the Federal Court. In *Supervisors* v.

*Rogers*, the Circuit Court from which the appeal was taken had adopted the state practice with reference to executions, as it was clearly authorized to do, and for that reason this Court affirmed the decision of the Circuit Court, without considering any other jurisdictional question. In *In re Stutsman County*, it was decided that an action to collect taxes could be removed by the defendants on the ground of diversity of citizenship. Not one of these cases involved any question of constitutional or international law in connection with an attempt to impose or collect taxes in federal courts outside the taxing state. It is clear that there is a fundamental distinction between the duties and powers of a federal court in the taxing state and one sitting elsewhere, yet the petitioner has cited no case holding squarely that federal courts may be properly used for the collection of taxes even if the action is brought in the taxing state. The cases which the petitioner has cited did not require or involve any decision on this point.

The disinclination of federal courts to interfere in any way with the revenue laws and the collection of taxes of or for states or political sub-divisions thereof, is shown in such decisions as *Heine* v. *The Levee Commissioners*, 86 U. S. 655, and *Rees* v. *City of Watertown*, 86 U. S. 107.

The petitioner seeks, at some length, in Point IV of his brief, to show that under the statutes of Indiana the taxes which are sought to be collected in this action were personal obligations in each year, whether or not the amount had been fixed by assessment. None of the statutes or decisions of Indiana could have any extraterritorial effect in the present case. The property of the decedent was not actually in Indiana during any of the years for which taxes were sought to be imposed, the taxes were not assessed until after the death of decedent and neither the decedent nor the respondents were within the State of Indiana when the taxes were actually assessed. The Circuit Court of Appeals properly held that under these circumstances the attempt to assess the taxes was fruitless. But even if the statutes of Indiana

created a liability, there would still remain the fundamental question as to whether or not such liability could be enforced in a federal court in New York, and it is plain that the District Court and the Circuit Court of Appeals properly held that it could not be.

In Point VI of the petitioner's brief, it is contended that there is a fundamental distinction between the conception of tax liability entertained by federal courts and the conception entertained by the courts of some of the states. To establish this proposition, the petitioner cites various decisions relating to the collection of federal taxes in federal courts. Obviously these have no application to the present problem. The fact that in federal courts under federal statutes the Federal Government is permitted to maintain an action for taxes, whether in the form of an action of debt or in some other form, does not furnish any authority for the present action or indicate in any way that in a federal court the liability to pay taxes to a state outside of the state in which it is sitting permits the maintenance of an action of debt or any other kind of an action.

If it should be held that the states and political subdivisions of the states are not limited to the collection of taxes from property or persons within their jurisdiction, and that they may apply to the Federal Court in any district where personal jurisdiction of the taxpayer can be obtained, then the protection afforded by the due process clause of the Federal Constitution and by such cases as *Pennoyer* v. *Neff*, 95 U. S. 714, would be removed.

It is for the removal of this protection and the opening of the Federal Courts to states and their political sub-divisions, unable or unwilling to collect their revenues through the orderly process of their own courts, that the petitioner contends upon this application. We respectfully submit that this proposal as applied to the present case does not require a review by this Court of the salutary and established principles forbidding extraterritorial collection of revenue.

## POINT III.

**The petition for a writ of certiorari should be denied with costs.**

Respectfully submitted,

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Counsel for Respondents.

LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
on the brief.

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DEC 5 1929
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 79.

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA,
*Petitioner*,

vs.

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS (SUED AS NEIL A. WEATHERS), AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED,
*Respondents*.

## BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

GRAHAM SUMNER,
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LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
FRANCIS H. HORAN,
On the Brief.

34,188.

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# Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 79.

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HARRY C. MOORE, as Treasurer of Grant County, Indiana,
Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS (sued as NEIL A. WEATHERS), as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased,
Respondents.

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## BRIEF FOR RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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### Supplemental Statement.

The Writ of Certiorari is to review the decision of the United States Circuit Court of Appeals for the Second Circuit affirming an order of the District Court of the United States for the Southern District of New York granting a motion made by the respondents to dismiss the complaint herein on the ground that the complaint did not state a cause of action of which the Court would take jurisdiction.

(Tr. fols. 23-24.) Opinions were rendered by Judge Knox in the District Court (Tr. fols. 25-27), and by the Circuit Court of Appeals (Tr. fols. 35-46.)

The action was brought by the plaintiff as Treasurer of Grant County, Indiana, to recover the sum of $982,516.22 with interest, against the defendants as executors of the Last Will and Testament of Richard Edwards Breed, deceased, for personal taxes for the years 1903 to 1926, inclusive, alleged to have been assessed against the decedent after his death as a resident of Grant County, Indiana, by the taxing authorities of said County. (Complaint, Paragraphs VI and VII, Tr. fols. 11-16.)

It appears from the complaint (Paragraph III, Tr. fols. 6-7) that the defendants are not sued in their individual capacities, but solely in their capacities as executors and that the defendants were qualified and appointed as such executors by the Surrogates' Court of the County of New York. The complaint does not allege that any of the decedent's property, referred to in Paragraph IV (Tr. fols. 7-10), was ever physically within the State of Indiana and, similarly, the complaint does not allege that the defendants were ever personally within the State of Indiana or that the decedent died there.

The complaint alleges two causes of action, the first of which is based upon an alleged indebtedness of the decedent and the defendants as executors to Grant County, Indiana, and its political subdivisions, for the taxes alleged to have been assessed against the decedent after his death, and the second of which is based upon an alleged unjust enrichment of the decedent and the defendants as executors by reason of the failure to pay such taxes. The action does not seek the enforcement of any lien and the plaintiff's effort is simply to enforce in the Federal Court sitting in New York against the defendants as executors an alleged personal liability of the decedent for taxes which was not liquidated until after his death.

The narrow question now presented in this case is whether or not the District Court for the Southern District

of New York should have taken jurisdiction of this action by the Treasurer of Grant County, Indiana, to collect taxes alleged to be due to the said county, assessed in the manner alleged in the complaint after the death of the decedent. The lower courts have held that it should not. If this Court should hold that the lower courts were right this litigation will be ended. If this Court should hold that they were wrong and that the District Court for the Southern District of New York should take jurisdiction of this action it will then be open for the defendants to answer the complaint and, if they are so advised, attack the validity of the Indiana legislation under which an attempt was made to assess the tax and to attack the action of the taxing authorities thereunder. The position of the defendants at this time before this Court is, that assuming for present purposes that the taxing authorities of Grant County, Indiana, went through certain forms of procedure to assess these taxes, the liability alleged to arise therefrom should not be enforced in the Federal Court sitting in New York. Much of the petitioner's brief is concerned with the argument that the action of the taxing authorities of Grant County, Indiana, in assessing the taxes after the decedent's death gave rise to a personal liability. This argument does not require consideration unless this Court concludes that the District Court should have taken jurisdiction if the taxes were validly assessed. Our position is that even if they were validly assessed the District Court properly refused to take jurisdiction.

The petitioner was and is unable to produce any decision or dictum by any court anywhere to sustain the jurisdiction claimed by him in this case. There are a multitude of authorities sustaining the action of the courts below which we shall refer to in Point I of this brief. One of the serious considerations mentioned by the District Court in its opinion (Tr. fol. 26), is that the claim asserted by the plaintiff is not recognized in the Surrogates' Court of New York County from which the defendants as executors derived their authority to act and to which they are responsible. In that Court they would not be free to pay the petitioner's claim and they

would not be required to pay it, because the Court of Appeals of the State of New York and the Surrogates' Court of New York County have held in *State of Colorado* v. *Harbeck, infra,* and *Matter of Anita Bliss, infra,* respectively, that taxes due to another state cannot be collected in the State of New York and are not debts of a decedent's estate. In the circumstances it seems entirely proper that the Federal Court sitting in New York should refuse to entertain jurisdiction of this action.

With reference to the concern expressed by the petitioner that the amount in controversy be paid to Grant County, it may be noted that the statute which purports to authorize the plaintiff to maintain this action, appearing in Paragraph IX of the complaint (Tr. fol. 19), contains a provision for his compensation which is not set forth in the complaint. This statute, Indiana Session Laws of 1927, chapter 54, page 141, Section 1, contains the following provision:

> "* * * said treasurer, in his name as such officer, may, or whenever requested so to do by the board of county commissioners, shall, at any time after delinquency, institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana, or by his legal representatives, whenever either said treasurer or said board, as the case may be, determines a reasonable probability exists that the said delinquent taxes, or a substantial part thereof, can be collected in this or any other state by such suit or proceedings, *and for his services in so doing the said treasurer shall charge and receive twenty-five per centum of such money so collected:* * * *." (Italics ours.)

## POINT I.

**Under the American and English authorities it is settled that the revenue laws of one sovereign are not to be enforced in another sovereignty.**

**(a) The American authorities in both federal and state courts universally recognize the principle of private international law which forbids the enforcement by one sovereign of the revenue laws of another.**

**(b) The English decisions without exception recognize the same rule.**

**(c) There is good reason for the rule recognized by the decisions and its application is peculiarly appropriate in the present case.**

The structure of the petitioner's brief makes it somewhat difficult to present the argument for the respondents in an orderly fashion by following the numerical order of the petitioner's points. Accordingly, with the Court's indulgence, we shall deal in this point with the matters mentioned in the title, which affect the petitioner's points III, IV, VII, and VIII.

### (a)

**The American authorities in both federal and state courts universally recognize the principle of private international law which forbids the enforcement by one sovereign of the revenue laws of another.**

The petitioner now frankly concedes that in this action he is endeavoring to have the Federal Court sitting in New York take jurisdiction of an action to collect taxes alleged

to be due to the political subdivisions of the State of Indiana. The nature of the alleged liability is not changed by its description in the complaint as an "indebtedness" on the part of the defendants. It is purely and simply an action to collect taxes claimed by Grant County, Indiana, which were assessed after the death of decedent. As this Court said in *Meriwether* v. *Garrett*, 102 U. S. 472 (1880), at pages 513-514:

> "Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States—and we believe in Tennessee—an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta* v. *North*, 57 Me. 392; *City of Camden* v. *Allen*, 2 Dutch. (N. J.) 398; *Perry* v. *Washburn*, 20 Cal. 318. Nor are they different when levied under writs of mandamus for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. * * *"

The District Court and the Circuit Court of Appeals for the Second Circuit concluded that the District Court for the Southern District of New York should not be employed as a tax collector for Grant County, Indiana, and refused to take jurisdiction of the suit. The District Court, in the course of its opinion, said:

> "As a result of what has been said, I do not conceive it to be the duty of this Court, notwithstanding the weight of insistence to the contrary, to undertake the enforcement within the State of New York, of the revenue laws of Indiana." (Tr. fol. 27.)

In the opinion of Judge Manton in the Circuit Court of Appeals, concurred in by Judge Augustus N. Hand, which affirmed the order of the District Court, it was said:

> "With the appellees and the property without the state, and the estate being administered in New York,

the effort to collect a tax, for a political sub-division of Indiana, is repugnant to the settled principles of private international law which preclude one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another. The taxing power of a state is, by the Federal Constitution, limited to persons and property within its jurisdiction. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265." (Tr. fol. 37.)

Wherever the question has arisen, the American courts have held uniformly that taxes due to one sovereignty will not be enforced outside of the territorial jurisdiction of that sovereignty. While the question does not seem to have been passed upon squarely by this Court, this Court said, in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (1888), at page 290:

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for *the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue,* or other municipal laws, and to all judgments, for such penalties." (Italics ours.)

In *Ashley* v. *Ryan*, 153 U. S. 436 (1893), this Court said, at page 440:

> "Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, *or involved the assertion of the right of a State to exercise its power of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.*" (Italics ours.)

In *New York Trust Company* v. *Island Oil & Transport Corporation*, 11 F. (2d) 698 (1926), the Circuit Court of Appeals for the Second Circuit had occasion to pass upon a

similar question. In that case the State of Virginia had assessed franchise taxes against a Virginia corporation for which receivers had been appointed by the District Court for the Southern District of New York. The receivers applied to the District Court for instructions as to whether or not they should pay the franchise taxes to the State of Virginia. Judge Knox authorized the payment of the taxes, and on appeal, the Circuit Court of Appeals affirmed the order, saying, in an opinion by the late Judge Hough, at page 699:

> "* * * if the receivers in the exercise of their business discretion deem it expedient to pay this tax, they are authorized so to do; but they are not required to do it, because the State of Virginia has no legal right to demand payment from them."

In discussing the question as to whether or not the State of Virginia was entitled to the taxes as a matter of law, it was said, at page 699:

> "If, however, in this suit and in the State of New York, Virginia had appeared and demanded payment, we think it could not have recovered.
>
> "Undoubtedly Virginia can go on taxing its own corporation as long as that corporation exists; but its right to recover against any property must rest either upon its sovereign power or upon statutes passed in pursuance thereof. But neither its sovereignty nor its statutes has any extraterritorial vigor."

The question has been passed upon squarely by the Court of Appeals of the State of New York in *State of Colorado* v. *Harbeck*, 232 N. Y. 71 (1921). In that case the State of Colorado sought to recover an inheritance tax upon the estate of a resident of Boulder, Colorado, who had died in the City of New York. His will and codicils thereto were admitted to probate in the Surrogates' Court of New York County and letters testamentary thereunder were duly issued. Transfer tax proceedings were had in New York. No provision was made for the payment of a transfer tax to the State of Colorado. Thereafter, the State of Colorado

attempted to assess taxes upon the estate as the estate of a resident of Colorado, and took the proceedings authorized by the Colorado statute. No part of the decedent's estate was physically present in Colorado at the time of his death or thereafter, and none of the defendants appeared in the Colorado proceedings or was a resident of Colorado. The Court of Appeals affirmed a judgment dismissing the complaint, and said, at page 83:

> "Although a liability to pay the tax exists under the Colorado statute, jurisdiction and power to enforce the liability in the New York tribunal must be established. Under the due process clause of the United States Constitution, where the delinquents are non-residents of the taxing state and outside its jurisdiction, so that no personal liability or enforcible duty may be established as against them and where the property involved is without the taxing state so that no *res* exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts and powerless to invoke the aid of a sister state to collect its revenue. (*Pennoyer* v. *Neff*, 95 U. S. 714; *Dewey* v. *Des Moines*, 173 U. S. 193; *City of New York* v. *McLean*, 170 N. Y. 374, 387, 388; *Matter of Maltbie* v. *Lobsitz Mills Co.*, 223 N. Y. 227.)
>
> "But plaintiff contends that by the application of a familiar fiction of law the legal situs of decedent's personal property attaches to his domicile in Colorado, although the property was in every reasonable sense within the state of New York, where the stocks, bonds and credits were kept, and that Colorado has an enforcible lien thereon by virtue of the taxing order. A sufficient answer to this contention is that the judgment in suit imposes a personal liability only and enforces no lien. A further answer is that *mobilia sequuntur personam* is not an exclusive rule of universal application nor does it transfer property into the foreign from the domestic jurisdiction. It is a rule of convenience merely, permitting taxation at the domicile of the owner of personal property which may at the same time be subject to taxation where the property itself is permanently located. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Union Refrigerator Transit Co.* v. *Ken-*

*tucky,* 199 U. S. 194, 206; *People ex rel. Hoyt* v. *Commissioner of Taxes,* 23 N. Y. 224, 227; *Maxwell* v. *Bugbee, supra.*) This state taxes the succession of personal property of non-residents according to the actual situs of the thing (*Matter of Romaine,* 127 N. Y. 80, 89) and our courts may not say that the assets of the estate are at the same time actually within and without the state of New York. The tangible *res* was, therefore, at all times in New York and not in Colorado.

"If these general and well-recognized principles of taxation are by any process of reasoning to be considered inapplicable to the collection of transfer taxes, a sufficient answer to the contention of the state of Colorado remains. When a statutory method of enforcing the collection of a tax is provided which requires judicial action before the liability of the taxpayer is finally fixed it is exclusive and must be followed. That it cannot be followed does not alter the case. The order which was entered in Colorado in the proceeding to fix the tax on notice by mail to defendants did not terminate a suit or controversy between parties and is not a judgment either *in personam* or *in rem.* (*People* v. *Kellogg,* 268 Ill. 489.) After the tax has been assessed by the preliminary order no person can be compelled to pay it until a citation issued out of a Colorado court having jurisdiction has been regularly served on him and he has had an opportunity to be heard. Unless this notice is given, the constitutional right to due process of law is invaded. (*Matter of McPherson,* 104 N. Y. 306, 321.) The Colorado statute thus provides (§§ 18, 19) for a proceeding to collect the tax, subsequent to the assessment, on notice to the persons interested in the property, in the nature of an action *in rem.* 'A statutory remedy or proceeding cannot be enlarged by construction nor be made available or valid except by strictly following the directions of the act.' (*Matter of Maltbie* v. *Lobsitz Mills Co., supra,* p. 232; *Oakman* v. *Small,* 282 Ill. 360.)

"But it is urged that the right of the state of Colorado to maintain an action for the collection of the tax when the special remedy is ineffective, is upheld by its local laws (*Pinnacle G. M. Co.* v. *People,* 58 Col. 86); that the Colorado statute provides that the attorney-general may collect the tax in 'any other manner as may be provided in this act *or by law*' (Act of 1916, § 13),

*i. e.*, by a common-law action. This contention also is unsound. The attempt to give such a statutory provision extraterritorial effect would conflict with another well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another. The remedy is a part of the law and we are once more brought to face the doctrine that the taxing power of the state is by the federal Constitution limited to persons and property within its jurisdiction. (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Marshall* v. *Sherman*, 148 N. Y., *supra*, pp. 24-26; *Loucks* v. *Standard Oil Co.*, *supra*, p. 102; *Walker* v. *Treasurer, etc.*, 221 Mass. 600; *City of New York* v. *McLean*, *supra*.)"

Attempt is made by the petitioner to distinguish the *Harbeck* case in Point VIII of his brief, pages 59 to 71, on the ground that it involved an extraterritorial imposition of the tax, which the petitioner concedes would be contrary to well-established principles of constitutional and international law, but the petitioner argues that this extraterritorial imposition of tax is to be distinguished from an extraterritorial enforcement of tax. We shall discuss this attempted distinction under subdivision (d) of the present point of this brief. The *Harbeck* case was decided upon two grounds, the first was the constitutional ground that Colorado had no jurisdiction to impose a tax, and the second ground was that under the principle of private international law, as stated in the *Harbeck* decision, which "* * * precludes one state from acting as collector of taxes for a sister state and from enforcing its penal or revenue laws as such", the action could not be maintained in the New York state courts. The attempt in the present case, like that made in the *Harbeck* case, is repugnant to the same two principles.

The petitioner contends that the *Harbeck* case is in effect overruled by the decision of this Court in *Blodgett* v. *Silberman*, 277 U. S. 1 (1927). This argument is adequately dealt

with in the opinion of Judge Manton in the Circuit Court of Appeals in which he said:

> "But it is said that *Blodgett* v. *Silverman*, 277 U. S. 1, overrules what is said in the *Harbeck* case. The *Blodgett* case did not deal with the question of extra-territorial enforcement of state tax statutes which is presented in this case. That case involved the question of whether the State of Connecticut could tax the transfer of certain intangible personal property under a will probated in Connecticut and collect the tax in a Connecticut court against executors appointed by the Connecticut Court of Probate. The deceased was domiciled in Connecticut at the time of his death. The court decided that intangible personalty has such a situs as the domicile of its owner and its transfer on his death may be taxed there. No question of jurisdiction of the State of Connecticut over the executors was presented. The decision in the *Blodgett* case was limited to upholding a transfer tax upon intangibles in a court which had jurisdiction to tax. That principle is recognized in the cases we have referred to.
>
> "Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogates' Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed is determined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a succession tax claimed, but a personal property tax. The application of the fiction of *mobilia sequuntur personam* would require an assessment during each of the years for which taxes are claimed. during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought." (Tr. fols. 40-42.)

It is apparent that since the *Blodgett* case did not deal at all with the problem of extraterritorial enforcement that decision does not affect the decision of the Court of Appeals in the *Harbeck* case on the point of extraterritorial enforcement. At most, the decision in the *Blodgett* case would furnish a guide to the Court of Appeals for determining the extent to which the fiction of *mobilia sequuntur personam* might be applied in certain circumstances. We do not understand that the *Blodgett* case has the effect of overruling the *Harbeck* case even on this point.

There are other American authorities sustaining the result reached by the lower courts in the present case. In *Matter of Anita Bliss,* 121 Misc. 773 (1923), the State of Vermont objected to the account of a New York executor filed in the Surrogates' Court of New York County, on the ground that it did not provide for the payment of transfer taxes claimed to be due to the State of Vermont, the state of conceded domicile, where an independent probate proceeding had been conducted. The State of Vermont asked that after the payment of administration expenses, taxes due the State of New York and debts due New York creditors, the assets be transferred to the executors appointed by the Vermont court for final distribution, or in the alternative, that no distribution be decreed until all taxes due the State of Vermont had been paid. The court dismissed the objections and said, after discussing the *Harbeck* case, at page 776:

> "The relief sought is the same in each case. Vermont cannot employ our courts as agencies to enforce the collection of its taxes. See, also, *People* v. *Kellogg,* 268 Ill. 489; *Walker* v. *Treasurer,* 221 Mass. 600; *State of Iowa* v. *Slimmer,* 248 U. S. 115. The claim that taxes are due does not make the state of Vermont a creditor of the decedent's estate. Transfer taxes are not debts. *State of Colorado* v. *Harbeck, supra; City of Rochester* v. *Bloss,* 185 N. Y. 42, 47; *City of New York* v. *McLean, supra.*"

In *State of Maryland* v. *Turner,* 75 Misc. 9 (1911), the court sustained a demurrer to a complaint in an action whereby the State of Maryland sought to recover from the defendant a sum equal to the amount of taxes assessed against him while he was a resident of Maryland. The complaint alleged, moreover, that the highest courts of Maryland in interpreting its tax laws had held that by the assessment of the tax, a legal duty and obligation was created under and by which the defendant agreed to pay the same. The court held that it was not bound to follow the decisions of the Maryland courts in this respect and that no rule of comity required the New York courts to enforce the tax laws of Maryland.

There are several cases in which plaintiffs have sought to obtain the assistance of the federal courts in levying taxes to pay interest and principal on bonds, and the courts have universally refused relief on the ground that the power to tax is purely a legislative function, and that it would be an invasion of such function by the judiciary of the federal government for it to levy and collect taxes.

*Heine* v. *The Levee Commissioners,* 86 U. S. 655 (1873);

*Rees* v. *City of Watertown,* 86 U. S. 107 (1873).

In *State of Arkansas* v. *Bowen,* 20 D. of C. Rep. 291 (1891), the Supreme Court of the District of Columbia refused to enforce a judgment obtained in Arkansas upon a bond, which included the amount of taxes which the county treasurer had purloined with high rates of penalties and interest. The court said, at page 295:

> "The question arises, whether, under such circumstances, this court should, by virtue of the laws of the United States or any comity that prevails between the States of this Union, entertain jurisdiction of this action. It has been very well settled that one State will not take cognizance of or enforce the judgment of another State where such judgment is founded upon penal laws or laws relating exclusively to the collection of the revenues

of the State wherein it is rendered. Such laws relating to the *domestic economy of the State,* and the management of its domestic affairs, are to be enforced directly by the courts of the State which enacts the laws, and not by the courts of other jurisdictions. This rule prevails under the international law between nations, and it has been held repeatedly that it prevails in the United States as between the States, and is not within the provisions of the Constitution of the United States which provides 'That the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered.' This does not relate to actions to recover penalties and fines, nor to actions authorized by statutes relating directly to the collection of the revenues of a State, or the enforcement of fines, penalties and forfeitures for non-compliance with or violations of such statutes.

"We find this principle clearly laid down in the case of *The State of Wisconsin* vs. *The Pelican Insurance Co. of New Orleans,* reported in 127 U. S., pages 289, 291, 292 and 293."

See also *Henry* v. *Sargeant,* 13 N. H. 321, 332 (1843).

**(b)**

**The English decisions without exception recognize the same rule.**

The rule announced by the American authorities as a principle of private international law, that one sovereign will not enforce the revenue laws of another sovereign, has prevailed in the English courts for almost two hundred years. The English cases apply the rule not only to claims made by foreign sovereigns, but also to claims made by Dominions of the British Empire, and political subdivisions thereof.

The rule was recently applied in *In re Visser* (1928), 1 Chancery 877. The plaintiff, the Queen of Holland, sought to recover for succession duties imposed by the law of Holland upon the estate of a Dutch subject who at the time of

his death in Amsterdam was domiciled in Holland. One of the defendants was executor of the will of the decedent, and he, and another defendant, were sued as executors or administrators. The third defendant, who was acting under a power of attorney from the executor, was sued as administrator of the personal estate in England. The plaintiff claimed that by the Dutch Succession Act the amount of succession duty constituted a debt from the estate to the Queen of Holland, with priority over all other unsecured debts. Upon motion to strike out the claim on the ground that it disclosed no reasonable cause of action, the court granted the motion and dismissed the action of the Queen of Holland. The court said, at page 881:

> "The short ground for the application is that these Courts do not take notice of the revenue laws of a foreign State, and that the foreign State cannot sue in this country for the recovery of taxes falling to be paid under the foreign law. It seems to be plain that at any rate for somewhere about 200 years, since the time of Lord Hardwicke, the judges have had present to their minds the notion, and have repeatedly said that the Courts of this country do not take notice of the revenue laws of foreign States. In Dicey's Conflict of Laws, 4th ed. (1927), p. 224, the rule is stated in this way. Rule 54: 'The Court has no jurisdiction to entertain an action—(i.) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State.' Now it appears that that word 'revenue' appeared in the rule for the first time in 1922 in the 3rd ed., p. 230; and in the prior editions—the 2nd ed. (p. 207) and the 1st ed. (p. 220)—it was expressed to be only for the enforcement of a 'penal' law of a foreign country. 'Revenue' was added in 1922, and 'political' was added in 1927; and it now runs: 'directly or indirectly, of a penal, revenue or political law. * * *' I am now asked by Mr. Bennett to say that that is an addition that is not justified, and that the statement in the 4th edition is not well founded. Mr. Bennett argues that there has never been an actual decision in this country—at any rate except one decided comparatively recently in 1909—in support of that proposition, that what has been said has been

mere obiter, and therefore ought now, to-day, for the first time, to be disregarded. His contention is that whatever may be said as to there being no authority, no actual decision, in support of the proposition, there is certainly no actual decision which definitely establishes the contrary. Of course the absence of authority for what, on the one side, is called an elementary proposition, may indicate that the proposition is not well founded in principle, but it also may merely indicate that it is so well recognized that it has never been put to the test. A number of cases have been cited, and I agree with Mr. Bennett that it is very difficult to say of any of them that it is a direct decision, with the exception of one which I will mention. The same view of the matter seems to have been taken in America, although there again the case referred to does not appear to contain a direct assertion but only a dictum, and there is no case which supports the view that the revenue laws of a foreign country will be enforced here."

And at page 883:

"There remains the one case of *Municipal Council of Sydney* v. *Bull,* (4), before Grantham, *J.* I think it is plain that if the plaintiff there had been a foreign State instead of a foreign municipality, it would be impossible to say that it was not a direct decision in point. I do not see myself that any distinction, or valid distinction, could be drawn between a plaintiff sovereign State—a foreign sovereign State—and a plaintiff foreign municipality, seeking in the one case to recover State taxes, and in the other seeking to recover the local municipal taxes or rates; they seem to me to be in *pari materia,* and sitting here and being bound by the ordinary rule to follow decisions of coordinate jurisdiction, I should feel myself bound to treat the case of *Municipal Council of Sydney* v. *Bull* as one which it was my duty to follow, and to regard this matter as, so far as courts of first instance are concerned, disposed of by that case; and to leave it to higher jurisdictions to determine whether the rule ought to be maintained. That is apart from my own opinion. My own opinion is that there is a well recognized rule, which has been enforced for at least 200 years or thereabouts, under which these Courts will not

collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these Courts will not entertain. That being so, this application must succeed. The statement of claim must therefore be struck out and the action dismissed; and, as the soverign State has submitted to jurisdiction by coming here, I am in a position to order the sovereign State to pay the costs of the action."

In *Municipal Council of Sydney* v. *Bull* [1909], 1 K. B. 7, the Municipal Council of the City of Sydney, New South Wales, brought suit in the English courts for the recovery of an amount assessed against the owner of property in Sydney for a municipal improvement. The Council was authorized by an act of the legislature of New South Wales to recover by action the amounts assessed and was also given a remedy by distraint. In granting judgment for the defendant, the court said, at page 12:

"Mr. Foote contends that this enactment enables an action to be brought in this country and makes the Courts of this country auxiliary to the Colonial Courts to this extent at all events, that whereas before the enactment this claim could not have been recovered by means of an action in the Colony, it is now recoverable not only there, but in this country also. Now, in my view, that was not the object or intention of the enactment. Its sole object and intention was to provide that within that area where the claim was recoverable it might be recovered by an action. It was urged that this is in its nature a transitory action. I do not think it is. Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes. But what restriction is to be imposed on such legislation if this claim could be put in suit in this country? It is true that the contribution which the Municipal Council of Sydney seeks to levy upon the defendant is a contribution in money, but it might be exacted in another form; the Colonial Legislature might have enacted that of those persons whose property had been improved one should plant trees, another should lay drains, and a third should sink wells and find water-provisions which under certain

given circumstances might be as wise and equitable as the levy of a rate for contribution in money. Could the persons who omitted to perform these statutory obligations be sued in this country? Certainly not. And the mere fact that in New South Wales the contribution is a money contribution enforceable by action as well as by distress makes no difference. The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State."

and at page 13:

"The contention of the plaintiffs would amount to this, that a foreign Legislature by imposing a personal liability upon its own subjects for its own municipal purposes can thereby impose upon the Courts of this country the duty of adjudicating upon questions which by the law of England are not properly cognizable by these Courts. In my opinion, the plaintiffs are no more entitled to recover the claim in England than the London County Council would be to recover in Sydney a penalty for a breach of their by-laws. There must be judgment for the defendant."

In *The Attorney-General for Canada* v. *William Schulze & Co.*, 9 Scots Law Times Reports 4 (1901), the Attorney-General for Canada brought an action for the recovery of costs awarded to the Crown in a proceeding in Canada arising out of an infraction by the defendant of the Canadian Revenue Laws relating to importations. The Lord Ordinary dismissed the action, saying, at page 4:

"But then comes the real difficulty of the case. It is a well-established rule of international law that the Courts of one country will not execute or enforce the penal laws of another; and this rule applies 'not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of Statutes for the protection of its revenue or other municipal laws and to all judgments for such penalties.' I quote these

words from the opinion of an American judge, because they were adopted with approval by their lordships of the Privy Council in the case of *Huntington* v. *Attrill* (1893, A. C. 150, at p. 157).

Accordingly, it was conceded by counsel for pursuer that, if he had been suing here for a penalty under the Revenue Statutes of Canada, the action would not have been maintainable. His argument is that this is not an attempt to enforce the execution of Revenue laws, that the forfeiture of the goods was complete before the litigation in Canada began, and that the costs were awarded to the Crown not as part of a penalty but as reimbursement of outlay occasioned by the fault of the defenders.

Now it is quite true that the litigation did not take the form of a suit for a penalty, but it is not accurate to say that the forfeiture was complete, in the sense of being final, before the litigation began. The question between the parties was truly whether the forfeiture was lawful, and if the defenders had succeeded the forfeiture would have been annulled. Accordingly, the suit was truly a Revenue suit; that is to say, in the sense of the international rule, it was a penal suit. The only question, therefore, is whether the costs of this penal suit can be so dissociated from the suit itself as to fall outside the rule of international law. I am of opinion that they cannot be so treated."

And at page 5:

"For these reasons, I am constrained to come to the conclusion that the action must fail. It is no doubt rather anomalous that the King, through his Courts in Scotland, should refuse to recognize a debt due to himself in Canada, merely because it arises out of the execution of a Revenue Statute. But it was not maintained, and I think is not maintainable, that in the sense of international law, the mother country and her self-governing colonies stand in different relationship from that which exists between two foreign states. If that relationship is ever to be modified it must be done by reciprocal legislation."

The relationship of the Dominions of the British Empire to the Empire itself bears considerable resemblance to the

relationship of the states to the United States. The last two cases show that the English courts recognize the impropriety of enforcing revenue laws of the Dominions in the English courts. In the last cited case, although the court recognized the incongruity of denying the Crown the right to sue in his courts in Scotland upon an obligation due him in Canada, nevertheless, it was held that the principle of private international law referred to, barred even such an action. That case surely presented a much more appropriate instance for entertaining jurisdiction than the action brought by the political subdivisions of the State of Indiana in the Federal Court sitting in New York.

Still more closely parallel to the present case is *City of Regina* v. *McVey,* 23 Ont. W. N. 32 (1922). In that case the Municipal Corporation of the City of Regina, in the Province of Saskatchewan, brought suit against a resident of the City of Ottawa, in the Province of Ontario, who had formerly been a resident of the City of Regina, for income taxes alleged to be due to the plaintiff for a portion of the year 1921. The report of the decision is as follows:

> "O'Brian, Co. *C. J.*, said that the case of *Municipal Council of Sydney* v. *Bull,* (1909) 1 K. B. 7, appeared to be fatal to the plaintiffs' right to recover for taxes, whether in respect of land or income, imposed under the authority of a foreign statute. The learned Judge could not find that the case had been overruled or modified by any later decision.
>
> "Judgment of nonsuit should be entered with costs."

While the decision is by a court of inferior jurisdiction it represents an application of the rule between the Provinces of the Dominion and indicates how completely the rule is intrenched in English jurisprudence.

The following English cases also recognize the force of the rule:

> *Holman* v. *Johnson,* 1 Cowper 341 (1775);
> *The Emperor of Austria* v. *Day and Kossuth* (1861), 3 De Gex, Fisher & Jones' Reports, 217, 241-242;

*Huntington* v. *Attrill* [1893], A. C. 150;
*Cotton* v. *Rex*, L. R. 1914, A. C. 176;
*Indian and General Investment Trust, Limited* v. *Borax Consolidated, Limited* [1920], 1 K. B. 539, 550;
*The King of the Hellenes* v. *Bostrom*, The Law Journal, July 14, 1923, at page 306 (not officially reported).

(c)

**There is good reason for the rule recognized by the decisions and its application is peculiarly appropriate in the present case.**

In Point III of the petitioner's brief it is argued that while criminal and penal liabilities should not be enforced outside of the jurisdiction imposing them, revenue laws stand upon a different basis and that no reason exists for failing to enforce them outside of the taxing jurisdiction. The ablest exposition of the reason for the classification of revenue laws with criminal and penal laws is to be found in the concurring opinion of Judge Learned Hand in the Circuit Court of Appeals in the present case, where he said:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists in my judgment which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in foreign States if they run counter to the 'settled public policy' of its own State. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate, should

be, beyond the powers of a court; it involves the relations between the States themselves with which courts have no power to deal and which are entrusted to other authorities. It may commit the domestic State to a position which would be of serious moment to the foreign State. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." (Tr. fols. 44-46.)

As we apprehend it, the point made by Judge Hand is that the courts of one state or a federal court sitting outside of the taxing state should refuse to entertain jurisdiction in any case where extraterritorial enforcement of tax liabilities is sought so that the court may not find itself in a particular case in the delicate and embarrassing situation of examining into the provisions for domestic order and economy of one of the states. Otherwise, the court would be obliged to determine in each case whether or not the nature of the tax and the manner of its imposition accorded with the public policy of the jurisdiction in which enforcement was sought. The petitioner suggests that such inquiry would not be troublesome and that as a practical matter no attempt would ever be made to enforce taxes where the tax or the method of its imposition did not accord with the policy of the state or federal court in which enforcement was sought. The petitioner argues that the tax programs of the states are generally similar to the tax programs of the federal government and, therefore, that the federal courts at least would never have occasion to prosecute the inquiry, the danger of which Judge Hand emphasizes as a reason for refusing jurisdiction. The petitioner then argues at page 20 of his brief, "It is necessary for the federal court only to determine whether the Indiana laws in question agree with its own notions of what is proper. These laws are ordinary personal property tax laws. There can be no question as to their propriety."

This argument shows the vice of the whole contention.

According to the petitioner's argument tax laws are to be classified for purposes of jurisdiction of the federal courts. Some tax laws, that is, those which are not similar to tax laws enacted by Congress, are to be classed with criminal and penal statutes. Others are not. Those which are not classed with criminal and penal statutes are to be examined by the federal court in which enforcement is sought and if found to accord with the policy of the examining court, are to be enforced there. Such procedure, however, would involve the prosecution of the inquiry suggested by Judge Hand and we submit that, aside from every other consideration, its prosecution by a federal court outside of the taxing state would present a greater source of political embarrassment and a greater departure from the judicial function than would be presented by the prosecution of that inquiry by the courts of one of the states. Its complications are particularly evident in this case. The petitioner has sought to invoke the jurisdiction of the Federal Court sitting in New York because the state courts would not recognize his claim. It is to the state courts that the defendants as executors are accountable. In those courts from which their authority is derived they would not be required to pay the petitioner's claim. If the Federal Court entertained jurisdiction of this suit and if the petitioner recovered judgment the recovery of such judgment would conflict directly with the state policy clearly declared by the Court of Appeals in the state in which the Federal Court is sitting. But before any such judgment could be recovered, in the event that the District Court should be compelled to take jurisdiction of the suit, the District Court would have to examine at the trial the statutes of Indiana to determine whether or not there were any taxes for which the defendants could be held liable. That examination would require the court to determine whether or not the taxing statute was valid and whether or not the procedure followed for assessment resulted in a valid assessment. In these respects it would have to consider whether it would apply the policy of the decisions in Indiana, the policy

of the decisions in the New York state courts or some separate policy of its own. It would find, perhaps, that in the Indiana courts the taxes would be regarded as properly assessed. It would find that under the decisions in New York they were not, and sitting in New York it would have to evolve some policy which would reconcile this square conflict of authority and justify it in imposing upon the defendants an obligation which the court conferring upon them their authority as executors would deny. It is difficult to conceive of a situation in which the Federal Court would be required more clearly to interfere in problems of domestic economy in two states than in the present case.

The petitioner contends that the Federal Court should take jurisdiction and so precipitate itself into these problems of domestic order solely because a political subdivision of the State of Indana was unable or unwilling to exercise diligence in collecting the taxes alleged to be due it. As Judge Manton said in the prevailing opinion in this case, "The taxing power of a State is by the federal constitution limited to persons and property within its jurisdiction." (Tr. fol. 37.)

The only reason offered for opening the Federal Court in New York to this plaintiff is that he has been unable to collect the taxes from persons and property within the jurisdiction of Indiana and that unless the Federal Court here is open to him, the Treasurer and Grant County will lose their respective shares in the taxes sought to be recovered.

We hardly need add that if this Court should hold that the District Court should have taken jurisdiction of the suit it will flood the federal courts with actions by taxing authorities whose neglect and delinquency could not otherwise be repaired. While this is perhaps not a reason for affirming the decisions of the courts below if they were not supported by authority, we submit that it is an appropriate consideration indicating the wisdom of the rule announced by all of the authorities and followed by the courts below. If the Federal Court in New York were required to take jurisdiction it would also result in an intolerable uncertainty in the admin-

istration of estates in New York and states following the rule announced in New York. In determining for what tax claims an estate would be liable, the representatives of an estate would have to ascertain the places of residence of their decedent from the time he owned any property which might by any possibility be deemed taxable by any state in which he had resided, then ascertain what part of said property was taxable by the state and what part by its several subdivisions. The representatives would then have to arrange payment of such of the claims of political subdivisions as exceeded $3,000 and to such of the subdivisions as would be likely to bring suit in the federal courts. They would not be required to make provision for taxes due the states because under the decisions the states would not have access to the federal courts for the collection of their taxes inasmuch as they would not be able to establish the necessary jurisdictional requirement that there should be a controversy between citizens of the several states.

The petitioner in Point IV of his brief refers to a note in the Columbia Law Review discussing the opinion in the Circuit Court of Appeals in the present case. It is argued from this discussion that the rule inhibiting the enforcement of revenue laws outside of the enacting jurisdiction had its origin in conditions of commercial rivalry and that its modern application is only justified between nations, where conditions of commercial rivalry exist. Whatever the origin of the rule may have been it does not now rest upon so insubstantial a foundation. Its application by the English courts in actions involving the Dominions and their political subdivisions, and its applications by the New York state courts and by the lower courts in the present case, show that the present logic of the rule is based upon the unwillingness of the courts of one sovereignty to subject to analysis and inquiry the domestic policies of another. We have already pointed out how compelling a reason for the rule this is in the federal courts. At page 24 of the petitioner's brief, in commenting upon the origin of the rule, it is said, "Even

were there sufficient reason to apply the rule as between the several states of the Union, as for instance, a desire to get the property of the tax-debtor within the state's territory for the benefit of its own citizens, no such reason obtains as between nation and the states. The policy of the nation toward the states is one of co-operation and not of rivalry." Whatever general application such description of the relation between the states and nation may have when reference is made to the common problems which the national government, by reason of its greater resources and centralized facilities, may perform for and with the states, it has no meaning in the present connection.

We assume that the quoted phrase from the petitioner's brief is used to suggest that the Federal Court sitting in New York should co-operate with Grant County, Indiana, so that Grant County, Indiana, may collect its taxes from persons and property within the State of New York and not within the State of Indiana, but we submit that nowhere is there authority for making the Federal Court in New York a tax-collecting agent for Grant County, Indiana. While the function of the Federal Court sitting in New York has perhaps not been defined for all purposes, the origin of the federal judicial system suggests that that court was designed to be an impartial tribunal, free from local prejudice against citizens from other states, administering the law of New York as conceived by the Federal courts sitting in New York insofar as the constitution and statutes of the United States do not require a different law to be administered. If the Federal Court sitting in New York has any duty to co-operate, or if there is any federal policy indicating that the Federal Court should co-operate with the states, it would seem reasonable that in the absence of controlling federal law to the contrary the Federal Court sitting in New York should first concern itself with co-operation with the state in which it sits, but the petitioner suggests that the one system of law to which the Federal Court should yield no allegiance whatever is the system

prevailing in New York, the state in which it sits. This must be so for the petitioner claims that the District Court sitting in New York should entirely disregard the state rule which is binding upon these defendants as executors, and should impose upon them an obligation repudiated by the courts from which they derive their authority, so that the petitioner and Grant County, Indiana, may share the fruits of the exercise of jurisdiction.

At pages 20 to 22 of the petitioner's brief it is argued that federal courts do not enforce the penal or criminal laws even of the states in which they sit, but that they do enforce revenue laws of the states in which they sit. The petitioner concludes, therefore, that revenue laws are upon a different basis from penal or criminal laws and that the fact that a federal court is not sitting in the taxing jurisdiction does not deprive it of jurisdiction to enforce a revenue law enacted elsewhere. In support of this argument the petitioner states at page 21 of his brief, that the reason for non-enforcement of penal and criminal laws, even in the district in which the federal court sits, is that the federal and state sovereignty is distinct and independent. This sufficiently disposes of the balance of his argument and clearly justifies the application of the rule as between separate sovereigns that one sovereign will not enforce the revenue laws of another. Moreover, the premises of the argument are faulty because the petitioner has been unable to cite a single case in which a federal court has entertained jurisdiction to collect taxes even for the state in which it sits where the question of its jurisdiction has been raised. The cases cited at page 22 of the petitioner's brief show plainly that the jurisdiction of the federal court was not questioned, and in the last two cases cited the reason for the exercise of jurisdiction was that it had been invoked by the taxpayer upon removal by him and accordingly, he was in no position to question the jurisdiction. While the cases cited by thepetitioner do not hold that a federal court has jurisdiction to enforce revenue laws even of the state in which it sits, a case holding that the federal court had such jurisdiction would not affect the result here for it is clear

that a fundamental distinction exists between the duties and powers of a federal court in the taxing state and one sitting elsewhere.

Reference is made by the petitioner to the provision of the Bankruptcy Act directing the payment of taxes and to cases thereunder holding that taxes due to states other than that in which the court administering the estate is sitting may be allowed as claims in bankruptcy. The allowance of such claims is based upon a statutory provision permitting their allowance and affords no authority for the extraordinary jurisdiction which the petitioner seeks to invoke here.

In Point VII of the petitioner's brief it is argued that extraterritorial imposition of tax laws must be distinguished from extraterritorial enforcement of such laws and it is urged that the latter is constitutionally unobjectionable. This argument was made in the Circuit Court of Appeals by the petitioner and was dealt with by Judge Manton as follows:

> "The appellant's argument that the extraterritorial imposition of tax is to be distinguished from the extraterritorial collection or enforcement of the tax, is without merit. The appellant attempted to impose a tax prior to the commencement of the action. The taxing authorities went through the forms prescribed by the statutes of Indiana, but Breed was dead before the assessment and the attempt was fruitless. The property was not physically there. Under the due process clause of the United States Constitution, Indiana had no jurisdiction to impose a tax because neither the property or the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national district court outside of the state to collect such tax." (Tr. fols. 39-40.)

If there be any distinction between extraterritorial imposition of a tax and extraterritorial collection of a tax it does not aid the petitioner in this case. We assume that the distinction which the petitioner attempts is between the levying of taxes by a state where neither the person who is to pay the tax nor the property taxed is within the state, and the levying of a tax by a state where either the person to be taxed

or the property to be taxed is within the state and the state seeks to collect the tax elsewhere. In the first case it is apparent that the tax is wholly void. If, in the first case, a state seeks to collect taxes so imposed in the courts of another jurisdiction such collection is inhibited by two rules, the first, a rule of constitutional law which requires that the state must have jurisdiction of person or property before a valid tax can be levied, and the second, a rule of international law which prohibits the courts of one sovereignty from giving any effect to the revenue laws of another. The prevailing opinion in the Circuit Court of Appeals took the view that the effort of the petitioner in this case was to collect taxes imposed without jurisdiction to tax and that the Federal Court in New York had no jurisdiction for both reasons. Judge Learned Hand's concurring opinion shows that he took the view that the Federal Court should not entertain jurisdiction for the second reason only.

In the second case, that is, in the case of what the petitioner apparently conceives to be extraterritorial enforcement of a tax, it is assumed that the state has jurisdiction to tax. The petitioner argues that in such case, since the state has jurisdiction to tax, there is no constitutional objection to the maintenance of suit to collect the tax in another jurisdiction. He argues that it gives rise to a transitory cause of action which may be enforced anywhere. Judge Learned Hand in his concurring opinion says with respect to this, "Generally it is of course true that a liability arising under the law of a foreign State will be recognized by the courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of a forum." (Tr. fol. 44.)

But whether the liability is under the foreign law or another, it can only be enforced with the consent of the forum, that is, the forum must be willing to entertain jurisdiction and enforce the liability unless the liability is of the character dealt with by the full faith and credit clause of the Constitution.

As we have pointed out above it seems plain that the attempt to assess taxes in this case did not result in an imposition of a valid tax liability. This was the view taken by two of the judges in the Circuit Court of Appeals, but it is unnecessary at this time to determine that question unless this Court feels that the rule of international law applied in the courts below should be abrogated. If the District Court should have disregarded the rule of international law, which is sustained by all the authorities we have cited, and does not depend for its virtue solely upon its antiquity, then the question of whether or not a valid assessment was made becomes important. The determination of that question, however, need not be made at this time because if the Court decides that the District Court should have entertained jurisdiction, then the question of the validity of the assessment may await a trial after the defendants have pleaded.

Accordingly, if we understand the distinction made by the petitioner between extraterritorial imposition and extraterritorial enforcement of tax, that distinction is of no avail to the petitioner in this case because whichever somewhat tenuous classification covers the present suit it is barred by at least one fundamental principle.

The petitioner argues that this is merely an action to collect a tax liability validly imposed and accordingly is not an action to enforce a revenue law as such. It is apparent that the true nature of this action cannot be concealed by any form of words. It is and remains an action to collect taxes alleged to be due to the plaintiff in his official capacity. The only statute pleaded in the complaint from which the petitioner claims the right to maintain the present action gives the Treasurer the right to "institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes * * *." (Statutes of Indiana, 1927, Chap. 54, page 141, Section 1, Tr. fol. 19.) If any valid tax was imposed this is and can only be, an effort to collect it. It is necessarily, therefore, an attempt to enforce a revenue law against persons and

property which were not within the State of Indiana at the time of the alleged assessment. All of the authorities which we have cited deal with a precisely similar situation. The *Harbeck* case goes a step farther than the other cases, for in that case there was no jurisdiction to tax. While we claim that in this case also there was no jurisdiction to tax, that question only becomes of importance, as we have pointed out, if the rule of private international law announced in all the cases is to be set aside.

## POINT II.

**Neither the view taken of these taxes in Indiana by the legislature or the courts, nor the alleged similarity between that view and the view taken by the federal courts of federal taxes justifies reversal.**

In Point V of the petitioner's brief a lengthy argument is made based upon the statutes and decisions in Indiana that the taxes for the years 1903 to 1926 for which this suit was instituted, although not liquidated or indeed actually assessed until after the death of the decedent at a time when neither the decedent's property nor the defendants as executors were in the State of Indiana, were validly imposed and resulted in a valid liability which may be enforced here.

The prevailing opinion in the Circuit Court of Appeals dealing with this phase of the matter is as follows:

> "Assuming Breed was domiciled in Indiana, as alleged in the complaint, the taxes were not assessed until after his death and until after the appellees were administering his estate in the jurisdiction of the New York Surrogate's Court. The amount of the tax had not been ascertained and no attempt was made to impose the taxes prior to death. The Indiana statute imposes a duty upon the resident to report taxable property. It creates no liability before the amount of taxes claimed

is determined. It was necessary for the taxing authorities to assess the taxes and determine the amount claimed to be due. It is not a transfer tax or a succession tax claimed, but a personal property tax. The application of the fiction of *mobilia sequuntur personam* would require an assessment during each of the years for which taxes are claimed, during the lifetime of the decedent, to reach the conclusion that there was a personal liability to pay these taxes during his life. Jurisdiction is not to be founded upon a multiplication of fictions and in no true sense can it be said that Indiana had jurisdiction to impose the taxes for which this suit is brought." (Tr. fols. 40-42.)

Judge Learned Hand in his concurring opinion concluded that the liability was valid. We have pointed out above that the determination of this question need not be made at this time. The first question to be determined is whether or not the District Court should have taken jurisdiction even if the tax was validly imposed. If it should have entertained jurisdiction, the consideration of the validity of the tax can await further proceedings in the action after the defendants have had an opportunity to answer. We contend that the prevailing opinion in the Circuit Court of Appeals properly concluded that the action of the taxing authorities referred to in the complaint did not result in the imposition of a valid tax, because neither the defendants nor any of the decedent's property is alleged to have been within the State of Indiana at the time the amount of the tax was determined. The solution of this problem does not depend upon the statutes or decisions of the State of Indiana but upon constitutional considerations, and the decisions and statutes of Indiana are, of course, not binding upon the Federal Court sitting in New York. In view of the fact that the determination of the validity of the imposition of the tax does not seem to be necessary to a determination of this appeal we shall not burden the Court with discussing the authorities cited by the petitioner in Point V. We do not, however, in any way concede that the taxes were validly imposed and we submit that the Circuit Court of Appeals in its prevailing opinion properly held that they were not.

In Point VI of the petitioner's brief an attempt is made to show that there is a fundamental distinction between the conception of tax liability entertained by the federal courts and the conception thereof entertained by the courts of some of the states. To establish this contention the petitioner cites various decisions relating to the collection of federal taxes in federal courts. Obviously these have no application to the present problem. The fact that in federal courts under federal statutes the federal government is permitted to maintain an action of debt or some other form of action does not furnish any authority for the present action or indicate in any way that in a federal court the liability to pay taxes to a state outside of the state in which it is sitting is to be enforced by an action of debt or any other form of action. The argument of the petitioner appears to be that since federal taxes may be collected in federal courts by an action of debt and the Indiana statutes and decisions make taxes such as are sought to be collected here, subject to collection by an action similar to that of debt, the Federal Court in New York must permit the plaintiff to maintain an action of debt for these taxes. The most that these cases suggest is that if the federal courts were to entertain actions for the collection of taxes due to states other than those in which they are sitting there would be no public policy hostile to the maintenance of such action in the form of an action in debt, but this does not aid the petitioner here. It is not the form of the action which furnishes the reason for denying the petitioner access to the Federal Court in New York, it is the substance of the action. There is no indication of any kind in any of the federal cases cited by the petitioner at this point or indeed at any point in his brief which furnishes any basis for the maintenance of the present action.

The argument at pages 45 to 47 of the petitioner's brief under Point VI is that the Federal Court in New York sits to administer the statutes of Indiana. The cases cited by the petitioner, however, merely hold that the federal courts will take judicial notice of the statutes of the states composing the Union. While the Federal Court in New York may

take judicial notice of the statutes of Indiana it may also refuse to enforce those statutes where they relate solely to the collection of revenue because the federal courts ouside of Indiana are not obliged to afford extraterritorial effect to the laws of Indiana as a matter of comity. As this Court said in *Huntington* v. *Attrill*, 146 U. S. 657, 683, in considering whether or not a state or federal court in which suit was brought on a judgment was free to determine for itself whether or not the judgment was based on a penalty:

> "In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.
>
> "In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought."

The doctrine of this case applies equally to actions to enforce revenue laws and the same reason which suggests that penalties under state statutes are not to be enforced in the federal courts or the courts of other states applies with equal force to actions to enforce revenue laws. Under our system of government a state may be able to impose by force certain obligations upon its citizens within its own borders in the nature of taxes or penalties which it cannot impose by right in other jurisdictions.

## Conclusion.

The judgment of the Circuit Court of Appeals should be affirmed. The decisions of the District Court and of the Circuit Court of Appeals follow all of the American and English authorities which have had occasion to deal with this question. Those authorities show that the rule has been subjected to frequent reexamination and the basis of the rule is

that the courts of one sovereign should not sit in judgment upon the provisions for the domestic economy made by another sovereign. The consideration of those provisions involves political considerations of the first moment. It would be peculiarly unfortunate for a federal court to put itself in the position of arbitrator between the public policies of the state in which it sits and other states. That is what the plaintiff asks it to do here and the District Court properly refused to assume jurisdiction. Aside from the powerful current of authority in favor of the rule applied in the courts below, based upon sound considerations of policy, the practical result which would follow a reversal would be to open the federal courts to a great variety of tax collecting litigation by the political subdivisions of all of the states, and to remove from the citizen the protection afforded by the requirement that taxes must be collected from persons and property within the taxing jurisdiction. In addition to these general considerations the position of these defendants as executors would be that they might be subjected to a liability to pay a substantial judgment, the proceeds of which would be divided between the plaintiff in his individual and in his official capacity, for which they might be personally responsible because of the rule in the state courts which the plaintiff has sought to escape by commencing this action in the Federal Court. The District Court properly refused to substitute its process for diligence on the part of the tax collectors of Grant County, Indiana.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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Counsel for Respondents.

LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
FRANCIS H. HORAN,
on the brief.

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# Supreme Court of the United States.

OCTOBER TERM, 1929.

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No. 79.

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HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA,
*Petitioner*,

*vs.*

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED,
*Respondents*.

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## PETITION OF THE PETITIONER FOR REHEARING WITH COPY OF OPINION.

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HENRY M. DOWLING,
*Of Counsel*.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

# Supreme Court of the United States

OCTOBER TERM, 1929.

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No. 79.

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HARRY C. MOORE, as Treasurer of Grant County, Indiana,
Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS, as Executors of the Last Will and Testament of RICHARD EDWARDS BREED, Deceased,
Respondents.

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## PETITION FOR REHEARING.

Comes now the above named petitioner, Harry C. Moore, as Treasurer of Grant County, Indiana, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof respectfully shows:

During the residence of Richard Edwards Breed in Indiana certain personal property taxes accrued against him in favor of Grant County and other municipal subdivisions of the State of Indiana, which taxes constituted personal obligations of the said Breed. The State of Indiana, so far as it had power so to do, authorized petitioner as Treasurer of Grant County to sue for such taxes outside the State of Indiana. By a statute enacted in 1927 the State authorized county treasurers to institute and prosecute to final judg-

ment all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside the State of Indiana or by his legal representatives.

The Circuit Court of Appeals rendered an opinion to the effect that a federal court of one State will not enforce the revenue laws in another State. This Court stated that it was not necessary to express any opinion on the question considered below and affirmed the decree of the Circuit Court of Appeals on the ground that the petitioner lacked legal capacity to sue.

Rehearing is asked for the reason that petitioner believes that the conclusion reached by this Court is unsound and that petitioner did not lack legal capacity to maintain the suit.

Petitioner's alleged lack of legal capacity is predicated upon a lack of power of the State of Indiana to give any force or effect beyond her own limits to the Act purporting to authorize this suit, and is supported by citation of authority to the effect that executors, administrators and chancery receivers without title may not sue *as of right* outside the State of appointment. Such alleged lack of legal capacity seems not to be based upon the nature of the cause of action, and the supporting authority indicates that the impotence ascribed to the State to authorize suit beyond its territorial limits is not confined to revenue actions. If this is intended, the logical result of the opinion is to preclude the State from authorizing suit, or recovering, outside its territorial limits, on a cause of action of any nature. By the logic of the opinion, should Indiana purchase road machinery in New York under warranty and should such machinery prove defective, Indiana would be unable to sue in New York for breach of warranty and would be wholly unable to recover its damages except insofar as it could recover judgment and levy execution on property within the State of Indiana. Even a judgment recovered in the State of Indiana would be ineffective unless property could be found in the State to satisfy the judgment, since the State would have no greater

power to authorize suit outside its limits on the judgment than on the original cause of action. Since such a result can scarcely be contemplated, petitioner assumes that the lack of power ascribed to the State of Indiana must be limited to power to authorize suits under revenue acts.

The opinion is based, not upon a refusal to entertain the suit under the principles of comity, but upon petitioner's alleged lack of legal capacity to maintain the suit.

Instances of authority to act beyond State boundaries are not uncommon; for example, authority granted to Commissioners of Deeds of a State to take acknowledgments in other states. There is no inherent lack of power in a State to authorize suit or other actions beyond its territorial limits, and the Act of 1927 is a valid exercise by the State of Indiana of its power to authorize the maintenance of suit beyond its limits, unless a state has less power in regard to the enforcement of rights under revenue laws than under other laws. The cases cited concerning the powers of executors, administrators and chancery receivers are not pertinent unless the reasons for denying power to sue outside the state of appointment apply also to county treasurers suing under the Indiana Act of 1927.

Executors and administrators are appointed for the purpose of administering the property of decedents. Chancery receivers are, generally, appointed for the purpose of administering the property of insolvents. By orderly practice the property in each jurisdiction is administered by an officer appointed by a court of the jurisdiction. There is no essential reason for according to an executor, administrator or receiver of the primary jurisdiction power to sue outside thereof since ancillary administrators or receivers may be appointed by the courts of other jurisdictions. The cases cited in the opinion do not negative the power of a State to accord to executors, administrators or receivers authority to sue outside the territorial limits of the State (subject to the right of courts of other jurisdictions to refuse to accord comity to such executors, administrators and receivers) but

decide merely that such authority is not given. In the present case the authority to sue outside Indiana is accorded to petitioner by the State if it is possible for the State to accord such authority. Unless such authority be recognized the revenues in question are lost to Grant County and the other municipal subdivisions; there can be no ancillary appointment.

Executors, administrators and chancery receivers are appointed for the purpose of administering property for the benefit of those entitled thereto. Citizens of one State should not be compelled to seek their distributive dividends as creditors of a decedent or insolvent in a foreign jurisdiction when they have at hand the means for satisfying themselves out of property situated within the local State and such means should not be taken away from them by a foreign executor, administrator or receiver obtaining possession of the local property. An executor, administrator or receiver taking property out of the local jurisdiction without giving security for its administration and without being subject to the supervision of the local court might seriously prejudice the rights of local creditors. Suits are freely allowed, however, by those asserting claims against the property in the hands of the executor, administrator or receiver. Such is the present case. Breed's property is being administered by executors in New York. Municipal corporations of Indiana, through petitioner, assert an adverse claim. Petitioner is not seeking to obtain possession of property to administer. The case is wholly unlike that of a suit by a representative seeking to obtain property in a foreign jurisdiction and the reasons governing refusal to entertain such suits have no application.

The conclusion of the opinion, that petitioner lacks legal capacity to sue, is based upon the premise that the reasons on which rest the established practice as to executors, administrators and chancery receivers apply with full force here.

This practice, as stated in the opinion, is that federal courts in one State decline to take jurisdiction of suits by executors and administrators appointed in another State, and limit chancery receivers to suits in the jurisdiction in which they are appointed. Such practice manifestly rests upon a refusal to extend comity rather than upon lack of capacity to sue. The opinion states that executors, administrators and chancery receivers are "without authority, in their official capacity, to sue *as of right* in the federal courts of other States." (Italics ours.) Such executors, administrators and receivers can so sue only if comity is extended, and the italicized phrase indicates that the bar is not a lack of legal capacity to sue but a refusal to extend comity. If this be true it is necessary that the question be decided whether a federal court in one State will, by comity, entertain causes of action arising under the revenue laws of another State.

This Court in its opinion in *Vaughan* v. *Northup,* 15 Pet. 1, 5, indicates that the objection to suit by administrators in a jurisdiction other than that of appointment goes to comity only. The Court said:

> "Every grant of administration is strictly confined in the authority and operation to the limits of the territory of the government which grants it; and does not, *de jure,* extend to other countries. It cannot confer, *as a matter of right,* any authority to collect assets of the deceased in any other State; and *whatever operation is allowed it beyond the original territory of the grant is a mere matter of comity,* which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens." (Italics ours.)

The situation in the present case is more closely analogous to the situation presented in *Converse* v. *Hamilton,* 224 U. S. 243, than to the case of a chancery receiver. In the *Converse* case a statutory receiver of an insolvent Minnesota Corpora-

tion sued in Wisconsin to enforce an asserted double liability of two stockholders. The court said at page 257:

> "But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a *quasi*-assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that State and elsewhere. So, when he invoked the aid of the Wisconsin court the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent*, a right of action, transitory in character, against one who was liable contractually and generally, if at all."

The statutory receiver in the *Converse* case, and the county treasurer in the present case, each derived his authority from a state statute, constituting the receiver a representative of creditors and the county treasurer a representative of the county and other municipal corporations, investing each with a right of action and charging each with the enforcement of such right.

In *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, which involved the power of a federal receiver to sue outside the jurisdiction of appointment, it was said at page 577: "If the powers of a chancery receiver in the Federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative and not judicial action." The Indiana Act of 1927 insofar as it is possible so to do clothes petitioner with power to sue outside the State of Indiana. If mere legislative authority is necessary to clothe chancery receivers with authority to sue outside the jurisdiction of appointment, any defect in the power of ordinary chancery receivers is supplied to the County treasurer in the present case.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, reversed.

The opinion of this Court herein is appended.

Respectfully submitted,

RUSSELL H. ROBBINS,
Counsel for Petitioner.

HENRY M. DOWLING,
Of Counsel.

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**Certificate of Counsel.**

I, RUSSELL H. ROBBINS, Counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

RUSSELL H. ROBBINS,
Counsel for Petitioner.

## Opinion.

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1929.

HARRY C. MOORE, as Treasurer of Grant County, Indiana, Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS, as Executors of the Last Will and Testament of Richard Edwards Breed, Deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 24, 1930.]

Mr. Justice BUTLER delivered the opinion of the Court.

Petitioner is the county treasurer of Grant county, Indiana. Respondents are the executors named in the will of Richard Edwards Breed, appointed by the Surrogate's Court in the county and State of New York and there engaged in the administration of his estate. Petitioner as such treasurer brought this suit in the United States District Court for the Southern District of New York to recover $958,516.22 claimed as delinquent taxes. The respondents moved to dismiss on the grounds that the complaint failed to state a cause of action, that the court had no jurisdiction of the subject matter, and that petitioner had not legal capacity to sue. The court declined jurisdiction and entered a decree dismissing the complaint. 28 F. (2d) 997. The Circuit Court of Appeals affirmed. 30 F. (2d) 600.

From 1884 until his death on October 14, 1926, the testator was a resident and citizen of Grant county, Indiana. During the last 24 years of that period he owned stock of corporations and other intangible property in respect of which there had been no return, assessment or payment of taxes. After testator's death the county auditor acting, as it is alleged, under authority of the statutes of Indiana ascertained the value in each year of the omitted property, assessed taxes thereon for state, county, city and township purposes and charged the same against such property and the executors. By the statutes of Indiana (§ 14,299, Burns' Statutes, 1926) it is made the duty of the treasurer of each county to collect the taxes imposed therein for county, city and other purposes. By § 1, c. 54, Session Laws of 1927, county treasurers are authorized "to institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana or by his legal representatives * * *". The recovery here sought is for Grant county, the city of Marion and the other political subdivisions therein of which the testator was a resident during the years for which such assessments were made.

The first question for consideration is whether petitioner had authority to bring this suit.

The United States District Court in New York exercises a jurisdiction that is independent of and under a sovereignty that is different from that of Indiana. *Grant* v. *Leach & Company,* U. S. . *Pennoyer* v. *Neff,* 95 U. S. 714, 732. And, so far as concerns petitioner's capacity to sue therein, that court is not to be distinguished from the courts of the State of New York. *Hale* v. *Allinson,* 188 U. S. 56, 68.

Petitioner claims only by virtue of his office. Indiana is powerless to give any force or effect beyond her own limits to the Act of 1927 purporting to authorize this suit or to the other statutes empowering and prescribing the duties of its officers in respect of the levy and collection of taxes. And, as Indiana laws are the sole source of petitioner's authority, it

follows that he had none in New York. Mechem, Public Offices and Officers, § 508. *State* v. *Scott*, 182 N. C. 865, 873. He is the mere arm of the State for the collection of taxes for some of its subdivisions and has no better standing to bring suits in courts outside Indiana than have executors, administrators, or chancery receivers without title, appointed under the laws and by the courts of that State. It is well understood that they are without authority, in their official capacity, to sue as of right in the federal courts in other States. From the earliest time, federal courts in one State have declined to take jurisdiction of suits by executors and administrators appointed in another State. *Dixon's Executors* v. *Ramsey's Executors*, 3 Cranch 319, 323. *Kerr* v. *Moon*, 9 Wheat, 565, 571. *Vaughan* v. *Northup*, 15 Pet. 1, 5. And since the decision of this Court in *Booth* v. *Clark*, 17 How. 322, it has been the practice in federal courts to limit such receivers to suits in the jurisdiction in which they are appointed. *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, 578. *Converse* v. *Hamilton*, 224 U. S. 243, 257. *Sterrett* v. *Second National Bank*, 248 U. S. 73, 76. The reasons on which rests this long established practice in respect of executors, administrators and such receivers apply with full force here. We conclude that petitioner lacked legal capacity to sue. It is not necessary to express any opinion upon the question considered below, whether a federal court in one State will enforce the revenue laws of another State.

Decree affirmed.

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CHARLES ELMORE

# Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 79.

HARRY C. MOORE, AS TREASURER OF GRANT COUNTY, INDIANA,
*Petitioner*,

*vs.*

SIDNEY Z. MITCHELL AND NIEL A. WEATHERS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF RICHARD EDWARDS BREED, DECEASED,
*Respondents*.

## BRIEF FOR RESPONDENTS

IN OPPOSITION TO PETITION OF THE PETITIONER FOR REHEARING.

GRAHAM SUMNER,
*Counsel for Respondents*,
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New York, N. Y.

LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
FRANCIS H. HORAN,
On the Brief.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

# Supreme Court of the United States

OCTOBER TERM, 1929

No. 79

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HARRY C. MOORE, as Treasurer of Grant County, Indiana,
Petitioner,

vs.

SIDNEY Z. MITCHELL and NIEL A. WEATHERS, as Executors of the Last Will and Testament of Richard Edwards Breed, deceased,

Respondents.

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## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION OF THE PETITIONER FOR REHEARING.

In reply to the petition of the petitioner for a rehearing of the above entitled cause, the respondents respectfully show:

Petitioner is the county treasurer of Grant County, Indiana. Respondents are the executors named in the will of Richard Edwards Breed appointed by the Surrogates' Court in the county and State of New York.

The petitioner as such treasurer brought suit in the United States District Court for the Southern District of New York to recover $982,516.22 alleged to be due to Grant County, Indiana, for personal taxes alleged to have been assessed against the said Richard Edwards Breed, and in his complaint relied solely for his authority to bring such suit on a statute of Indiana. The respondents moved to

dismiss the complaint on the ground that it failed to state a cause of action, that the court had no jurisdiction of the subject-matter, and that petitioner had not legal capacity to sue. The court declined jurisdiction and entered a decree dismissing the complaint. 28 F. (2nd) 997. The Circuit Court of Appeals affirmed. 30 F. (2nd) 600. This Court, in an opinion delivered February 24, 1930, by Mr. Justice Butler, decided unanimously that petitioner lacked legal capacity to sue, and affirmed the decree below. 50 Sup. Ct. 175.

Petitioner asks for a rehearing because he alleges that he believes that the conclusion reached by this Court is unsound and that petitioner did not lack legal capacity to maintain the suit. His contention is that the logical result of the opinion of this Court is to preclude his State from authorizing suit for recovery outside its territorial limits on a cause of action of any nature. But it is our understanding that this Court will decide cases only as they are presented, and that a party will not be heard to say that a rule announced by this Court as applicable to him will have an effect which he conceives to be harmful to other litigants in cases of other natures which may arise at other times.

Petitioner suggests that the analogies as to executors, administrators and receivers adopted by this Court in its opinion are imperfect. In addition to those authorities cited by this Court in its opinion there might have been cited numerous other such authorities, all to the effect that an executor, administrator, receiver, or indeed any officer of a state, acts with authority only when within the state which empowered him. See:

*Johnson* v. *Powers*, 139 U. S. 156; 11 Sup. Ct. 525; 35 L. Ed. 112 (1891);

*Thorburn* v. *Gates*, 225 Fed. 613 (D. C., S. D. N. Y. 1915);

*Lawrence* v. *Southern Pacific Co. et al.*, 177 Fed. 547 (C. C., E. D. N. Y. 1910);

*Filer & Stowell Co.* v. *Rainey et al.*, 120 Fed. 718 (C. C., N. D. Ill., N. D. 1903);
*Watkins* v. *Eaton*, 183 Fed. 384 (C. C. A., 2nd Circ., 1910).

Actions brought by executors or administrators or by receivers happen to be the most numerous illustrations of the rule, which is, of course, applied to all who depend for their authority upon powers conferred by a sovereign state. The assumption of the petitioner that the principle rests on practical considerations alone overlooks the most fundamental point in the relations of one sovereign state with another, that the authority of an official of a sovereignty ends at its boundaries.

By statute, of course, a sovereign state may permit a representative of another sovereignty to make use of its courts in order to enforce claims asserted by such representative, but the petitioner did not rely in his complaint nor does he here rely on any statute of the State of New York, or on any Act of Congress, permitting the county treasurer of a county of another state, when so empowered by statute of his home state, to sue in the state or federal courts of New York for the recovery of taxes alleged to be due to the county which he represents.

That liberty of every nation to yield or withhold the operation of authority conferred without its borders, referred to in *Vaughn* v. *Northup*, 15 Peters 1, 5, and quoted in the petition of the petitioner, is illustrated by the widespread adoption throughout the states of statutes allowing foreign executors or administrators access to the local courts, upon conditions fulfilled.

Indeed, *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, contains language quoted in the petition of the petitioner which neatly states the difficulty with which he is faced when it says, that "such enlargement of authority [of a federal receiver outside the jurisdiction of his appointment] should come from legislative and not judicial action".

The mistake of the petitioner is in assuming that such reference to legislative action means legislative action as to the powers conferred upon a receiver by the jurisdiction in which he was appointed. But it was the legislature which regulated the jurisdiction of the forum to which this Court referred.

We respectfully submit that the petition for a rehearing should be denied.

GRAHAM SUMNER,
Counsel for Respondents,
120 Broadway,
New York, N. Y.

LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
FRANCIS H. HORAN,
on the brief.

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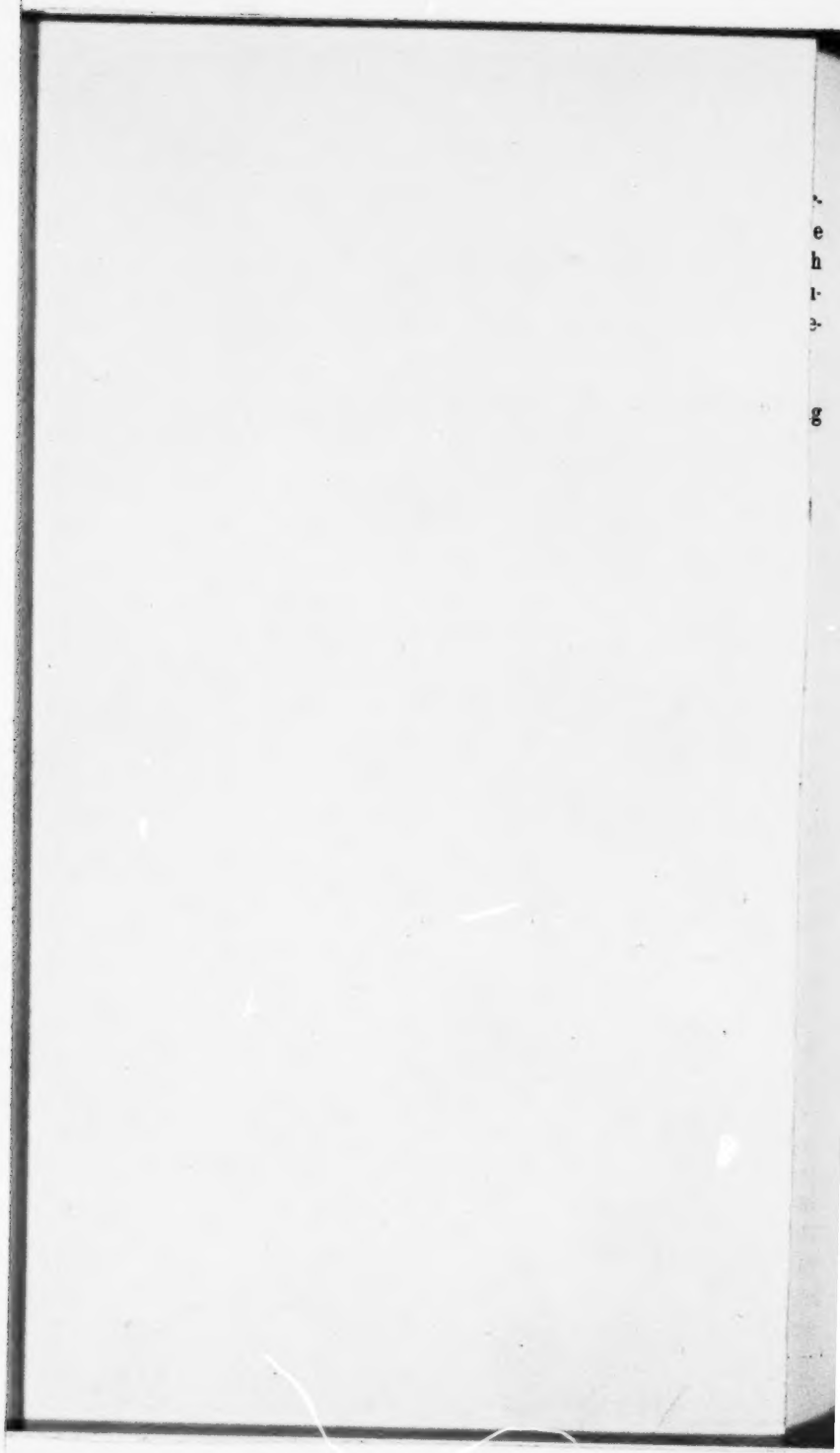

# SUPREME COURT OF THE UNITED STATES.

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assessed taxes thereon for state, county, city and township purposes and charged the same against such property and the executors. By the statutes of Indiana (§ 14,299, Burns' Statutes, 1926) it is made the duty of the treasurer of each county to collect the taxes imposed therein for county, city and other purposes. By § 1, c. 54, Session Laws of 1927, county treasurers are authorized "to institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the State of Indiana or by his legal representatives . . . ". The recovery here sought is for Grant county, the city of Marion and the other political subdivisions therein of which the testator was a resident during the years for which such assessments were made.

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It is not necessary to express any opinion upon the question considered below, whether a federal court in one State will enforce the revenue laws of another State.

*Decree affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*